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FIRST DEAN OF THE SCHOOL

By his Wife and Daughter

A. M. BOARDMAN and ELLEN D. WILLIAMS

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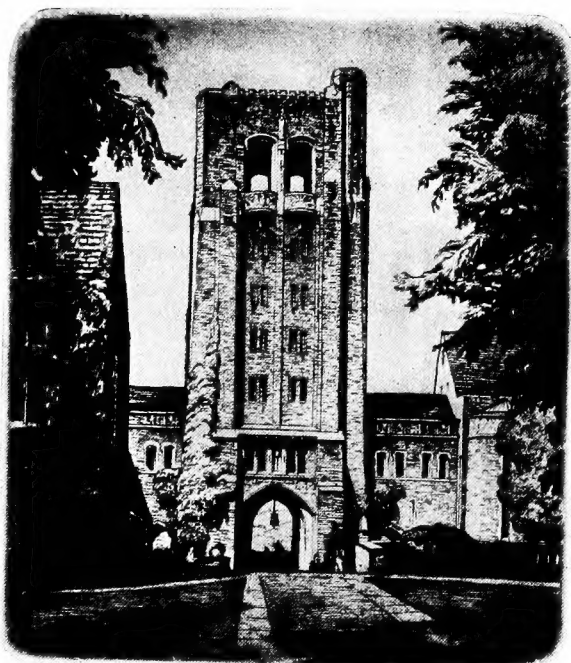
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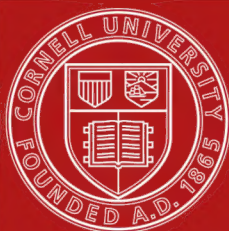


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A

CONCISE AND PRACTICAL TREATISE OF

THE LAW

OF

VENDORS AND PURCHASERS

OF

ESTATES.

Bonæ fidei venditorem, nec commodorum spem augere, nec incommodorum cognitionem obscurare oportet. — Valerius Maximus, l. vii. c. 11.

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THE LAW
OF
VENDORS AND PURCHASERS
OF
ESTATES.

CHAPTER XI.

OF THE ABSTRACT AND OF THE PRODUCTIONS OF DEEDS ; OF
COVENANTS TO PRODUCE THEM, AND OF ATTESTED COPIES.

SECTION I.

OF PREPARING AND EXAMINING ABSTRACTS.

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1. THE preceding chapter points out the proper root of title to the various descriptions of property: to this, therefore, reference should * be made in order to ascertain where any particular abstract should commence. I shall now, with the assistance of Mr. Preston's able Treatise on Abstracts, proceed to make a few practical observations on,—1, the mode in which an abstract should be prepared; 2, the manner in which it should be examined; and 3, the way in which it should be perused.

2. Formerly the title deeds were delivered to the purchaser, and his solicitor prepared the abstract at his expense, and the abstract was compared with the title deeds by the counsel before whom it was laid.(a) But the seller's solicitor now prepares the abstract at his expense, and the purchaser's solicitor examines the abstract with the deeds at the purchaser's expense. And a purchaser may insist upon an abstract, and is not bound to wade through the deeds. Where a seller undertakes to produce an abstract, and in his declaration avers that he has done so, that allegation will not be sustained by proof that he delivered the deeds themselves to the purchaser.(b)

3. A seller may upon a suit for a specific performance be compelled on oath to bring into the office of the court *all* documents in his possession or power relating to the title, yet he is not bound to furnish an abstract commencing before the proper period, whether the purchase is completed in or out of court. Where circumstances disclosed by the instruments abstracted or otherwise known to the purchaser require the production of any portion of the earlier title, the true rule perhaps is, that the seller must furnish an *abstract* of any instrument, however ancient, upon the contents and construction of which the title depends, but that where the instrument is required simply to establish a fact or to negative an inference, it is sufficient to produce the instrument itself as such evidence.

4. The abstract should be fairly written on the usual paper.(c) In my practice as a conveyancer I many times refused to peruse papers illegibly written, or written upon such thin large paper that a long abstract could not be conveniently perused.

(a) See *Temple v. Brown*, 6 Taunt. 60.

(c) 1 Pres. Ab. 75.

(b) *Horne v. Wingfield*, 3 Sco. N. C.

Every abstract should state in the heading whose title it is, and for what interest; and when it is laid before counsel a copy of the agreement or conditions of sale should be sent with it. The strict legal charge for drawing an abstract is 6s. 8d. for each sheet of *ten* folios of seventy-two words, and 3s. 4d. for the copy; but, unless objected to, the masters used to pass abstract sheets as proper ones, if they contained an average of *eight* folios per sheet.(d)

* 5. The title should, as we have seen, as a general rule, commence sixty years back. The solicitor should abstract every document upon which the title depends, or upon which any difficulty has arisen. Wherever he begins the root of the title, he ought to abstract *every* subsequent deed, and if he were to suppress any by which the purchaser should be damnified, he would be answerable for the loss. But there is no pretence for a purchaser requiring, or a seller's solicitor furnishing an abstract of all the deeds in his possession, however ancient: this is never done by a respectable solicitor, and could not be justified, nor could a purchaser insist upon such an abstract. In a late case,(e) where the root of the title depended upon general devises and a proof of seisin, it was held to be the right of the purchaser to have inspection of *any* documents relating to the property, which were in the possession of the vendor, but the learned judge did not decide that he had a right to have them abstracted; that was a very different thing. The learned judge did not decide whether, as a general rule, a purchaser is entitled to see any deeds relating to the property that are not abstracted, although the abstract may show a good sixty years' title.(f) Upon the completion of his purchase, he will undoubtedly be entitled to *all* the documents in the seller's possession, but the rule as to a sixty years' *abstract* applies generally, and is not restricted to the case where the seller has not an earlier title. Where a good sixty years' title is shown on the abstract, the courts would discountenance a demand for the inspection of the earlier documents, which would lead to delay and expense.(f¹)

(d) *In re Walsh*, 12 Beav. 490.

(e) *Drummond v. Tracy*, John. 608.

(f) *Parr v. Lovegrove*, 4 Drew. 170.

(f¹) [An agreement to accept a possessory title merely points to the evidence by

which it is to be supported, and the vendor is still bound to prove sixty years' possession. *Douglas v. L. N. W. R. Co.* 3 K. & J. 173.]

6. In titles under inclosure acts, a printed copy of the act should be furnished, and the abstract, as far as it relates to the inclosure, should contain only a reference to the act, with an official extract from the award.(g) The queen's printer's copies of private acts are now made evidence without further trouble.(h) Where an estate has been purchased in parcels under different titles, every title should of course be traced separately, until they all unite in one common title.

7. The parties should be stated, with their descriptions, shortly, if deemed necessary.

8. The recitals should also be stated of the deaths, failure of issue, and the like, which frequently renders further evidence of those facts unnecessary, and sometimes leads to incumbrances, or the like, the instrument creating which is not with the deeds.(i) Recitals should be introduced as such where they occur, and not as *substantive statements of fact. The deeds, &c., already abstracted, may be stated to be recited, but an abstract of the recitals could not be justified.

9. The witnessing part is always introduced as such. It should state the consideration, and the motive or object of the parties where that is set forth.(k)

10. The granting part should be stated in the very words, but of course not repeating them; and the exact words used in conveying the estate unto the grantee, &c., should be stated.

11. The parcels should be stated accurately, but not at unnecessary length; and they should, in subsequent instruments, only be referred to, unless a new or some additional description is introduced, which should be stated.(l) The abstract may refer to a map or plan annexed to any of the deeds for the purpose of identification. A map or plan is clearly not a necessary part of an abstract.(m)

12. Any exception in the deed relating to the property sold, should, of course, be abstracted.(n)

13. The *habendum* should be stated in the very words as

(g) 8 & 9 Vict. c. 113, s. 3.

(h) *Ibid.*

(i) 1 Pres. Ab. 63, vol. 3, p. 8, 229;
Gillett v. Abbott, 7 Ad. & El. 783.

(k) 1 Pres. Ab. 69.

(l) 1 Pres. Ab. 56, 81, 90, 94; vol. 3, p. 31, 40, 212.

(m) Blackburn v. Smith, 2 Ex. 783.

(n) 3 Pres. Ab. 36.

regards the grantee, his heirs, &c., and it will then appear whether the *habendum* is simply unto the grantee and his heirs, &c., or unto and to the use of him, &c. Upon this point the person abstracting should not exercise his judgment, but copy the words.(o)

14. The limitations and uses should be accurately stated. Where the *common* words are accurately introduced, the effect of them only should be stated; (p) *estates tail*, therefore, should be stated as such, and the precise words of limitation not introduced; but every limitation out of the common course, and every proviso defeating or abridging any limitation, should be accurately stated. Where the provisos are, although complicated, yet common ones, and the event provided for has not happened, they should only be referred to; for example, a proviso for shifting the estate from the elder branch to the younger, if the former should acquire another estate, should be stated in a few words where it never operated; but it should not be altogether omitted although the event did not arise.

15. Provisos for cessors of terms, where they are considered to have operated, should be fully stated.(q)

16. If there are any trusts they should be stated, with all the conditions and requisitions attached to them, unless they never arose, in which case the fact should be stated, and the trusts simply referred to.

* 17. Powers should be stated shortly, unless they have been exercised, as in the case of a power of sale and exchange, or power to appoint new trustees, the material parts of which should be stated where it has been executed. A power to lease seldom requires to be more than referred to. Powers to trustees to give discharges should be stated simply in those words; for now trustees' receipts generally are made good discharges by legislative enactment.(r)

18. The usual covenants, for example, the common covenants for title, should be referred to as such, but any special matter should be abstracted. Frequently the covenants disclose incumbrances not noticed elsewhere. Covenants to produce deeds in

(o) 1 Pres. Ab. 97; vol. 3, p. 39.

(p) 1 Pres. Ab. 99, 104, 117, 121.

(q) Ch. 16, *infra*.

(r) 22 & 23 Vict. c. 35, s. 23; *infra*, ch. 12, s. 5.

like manner contain references to deeds not with the title. The seller's solicitor is bound to abstract them fairly.(s)

19. When the instrument is abstracted, it should be stated with accuracy by whom it is executed;(t) and if by attorney, that fact should be stated, and the power should be abstracted shortly. Where livery of seisin, as upon feoffment, or enrolment, as upon a bargain and sale, is required, the fact and date should be correctly stated.(u) If the deed be in execution of a power requiring witnesses, the form of attestation and the number of witnesses should be stated.(x)

20. Where a receipt is indorsed, that should be stated, and by whom it is signed.(y)

21. If the estate is in a register county,(y¹) the fact of registry should be regularly stated.

22. In cases of intestacy of freehold estates, it is desirable to state how the intestacy is proved, as, for example, by letters of administration, which are the best proof. And generally all the evidence in support of facts recited or stated should be referred to. It will be sure to be inquired for if not referred to, and that leads to additional labor and expense. Where a title depended upon an intestacy, and the seller relied upon an affidavit showing circumstances from which the intestacy might be inferred, but declined to search the bishop's or the prerogative court, it was held that he was bound to do so, as he was bound to produce the best evidence reasonably within his reach.(z)

23. In abstracts of title to leaseholds, the deduction should be regularly made out from the original lease by the assignments or by recitals, which in some cases will supply the loss of assignments,(a) * and by probates and letters of administration in courts of competent jurisdiction.(b)

24. In the case of renewable leaseholds, it must be shown how

(s) 1 Pres. Ab. 152; vol. 3, p. 56.

(t) 1 Pres. Ab. 154, 276.

(u) 7 & 8 Vict. c. 76; 8 & 9 Vict. c. 106.

(x) 3 Pres. Ab. 371.

(y) 1 Pres. Ab. 72, 155, 299.

(y¹) [The registration of deeds is universally required in the United States, so that the rule in the text would be a gen-

eral one in this country. 4 Kent (11th ed.), 456; 2 Cruise Dig. by Mr. Greenleaf, tit. 32, ch. 29, § 1, note, § 20, note, vol. 4, pp. 545, 555.]

(z) Parr v. Lovegrove, 4 Drew. 170.

(a) Ch. 10, *sup.*; Doe v. Maple, 3 Bing. N. C. 832.

(b) 1 Pres. Ab. 11.

the old leases for a reasonable period were settled, in order to prove that the new leases are not affected by any equity.(c)

25. The creation of terms of years assigned to attend the inheritance should be shown by the abstract, but the intermediate assignments may be abstracted very shortly.(d)

26. In cases of a title by descent, the best proof by letters of administration, leases, assessments to land tax or the like, should be obtained, but hereafter titles within the range of the statute,(e) will not require to be carried back in order to show who was the first purchaser.(f) But in every case a regular pedigree should be properly vouched.

27. In abstracting wills, where the usual technical terms are not used, it is necessary to state the exact terms of the devise; and all modifications of it, by proviso or otherwise, should be accurately stated.(g)

28. Acts of parliament generally may be concisely stated, because there is mostly a printed copy with the title which can be read with facility, and may therefore with propriety be sent with the abstract, and referred to.

29. Judgments, crown debts, and the like, should be stated succinctly. This, however, was formerly seldom done, but the purchaser was left to discover such incumbrances by search or inquiry; but now that judgments are made an actual charge upon the property, it would not be safe for the seller's solicitor to withhold a statement of them.

30. No particular directions can be usefully given as to decrees. The nature of the question will point out whether it is necessary to do more than abstract the date, parties, and declaratory part of the decree. Where there is a reference to the master or the chief clerk important to the title, the result should be stated, with the order or decree on further directions.(h)

31. Commissions of bankrupt, or petitions in bankruptcy, are usually stated shortly, and if the bankruptcy is of recent date, and the bankrupt do not concur in the conveyance by his as-

(c) Ch. 10, *sup.*; 1 Pres. Ab. 14.

tation, *Bridger v. Huett*, 2 Fos. & Fin.

(d) 1 Pres. Ab. 25, 148, *post*. See now

35.

8 & 9 Vict. c. 112.

(g) 1 Pres. Ab. 178.

(e) 3 & 4 Will. 4, c. 106, *post*, ch. 12.

(h) 1 Pres. Ab. 188.

(f) 1 Pres. Ab. 22, 43, *inf.*; by repu-

signees, the purchaser's solicitor inspects the proceedings as to the act of bankruptcy, * &c.(i) Now the property vests in the assignees for the time being without any conveyance.(j)

32. We have already seen that the seller's solicitor would be personally responsible for suppressing an incumbrance.(k) And whilst preparing an abstract, he cannot be too careful in furnishing the purchaser with the real state of the title. He is now made criminally responsible for concealing any instrument material to the title, or any incumbrance from a purchaser, or falsifying a pedigree in order to induce him to accept the title with intent to defraud.(l) In a case where an equitable charge was not stated in the abstract or communicated to the purchaser, and the excuse was that the person entitled to the charge was content to be paid off as far as the purchase money extended, the vice chancellor, of course, disapproved of the suppression; and even as to equitable charges which have been discharged, he had no doubt whatever that such charges ought in some way to be communicated to a purchaser.(m) The facts of the charge and discharge should be stated shortly; which would add but a few lines to the abstract, and the purchaser would look at the papers.

33. The purchaser's solicitor is bound to examine the abstract with the deeds, and if he were by negligence to overlook an important provision by which his client should be damnified, he would be answerable for the loss. *This examination should never be left to an incompetent person.* In the case of wills, particularly, the solicitor is bound to read through the whole will. Upon him devolves the duty of seeing that the evidence is what it purports to be, and that the deeds and wills are duly attested, and the receipts on the deeds properly indorsed and signed. An estate has been lost principally from the manner in which the receipt was indorsed, which would have led a vigilant purchaser to inquire further, when he would have discovered the fraud

(i) 1 Pres. Ab. 167.

(l) 22 & 23 Vict. c. 35, s. 24, *inf.* ch. 12,

(j) 1 & 2 Will. 4, c. 56, s. 26; 12 & 13 s. 5.
Vict. c. 106; 24 & 25 Vict. c. 134.

(m) *Drummond v. Tracy*, John. 608.

(k) *Introduct. chapter.*

which had been committed.(n) He should also see that the modern deeds are duly stamped.(o)

34. If the abstract is on the face of it properly framed, which a competent person will be able to tell at a glance, the examination of it may be delayed until after the abstract has been perused by counsel, when the solicitor can at the same time ascertain the correctness of the abstract, and investigate the points suggested by the counsel.

* 35. Sometimes a solicitor enters into a discussion upon a title, which generally ends by a reference to counsel, and often by a chancery suit. Unless a solicitor is competent to direct his client throughout, a recourse to counsel at once will save both time and money.

SECTION II.

OF PERUSING ABSTRACTS.

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| 17. Evidence admitted, and how acted upon. | 35. Counsel's opinion not binding on purchaser. — Counsel and solicitors bound to secrecy. |
| 18. Formal evidence. | |
| 19. What formal evidence not required. | |

1. IN regard to the best mode of perusing an abstract by counsel, I will simply state what always appeared to me the best mode.(a) The perusal should, if the length of the abstract

(n) *Kennedy v. Green*, 3 My. & Ke. (a) 1 Pres. Ab. 208; vol. 3, pp. 59, 191, 699.

(o) 1 Pres. Ab. 201.

will permit of it, be finished at one sitting, although any difficult point of law, the whole bearing of which is ascertained, may properly be reserved for further and separate consideration.

3. It is not useful to make many notes, for they often distract the attention. In one instance a counsel in perusing an abstract, actually inserted a note in the margin opposite to a deed with a serious defect, stating it to be what it ought to have been, and so the objection was missed. His mind was engaged in making the note, and as he knew how the instrument ought to have been framed, he inserted what was not contained in the abstract,—a fatal error, but one not unlikely to occur in a moment of absence.

4. Still a man should not incumber himself with unnecessary details. He may save himself much unnecessary labor by a little * method, and by writing his opinion with his notes in a book as he proceeds, reserving, if necessary, any important point for subsequent consideration. In the margin he should note every term of years created, and the folio in which every assignment of it will be found. Nothing more is requisite where there is a regular deduction, and he can at once, when he comes to deal with the terms, refer to the title to them separately. Where there is a long deduction of a legal estate of inheritance, he may pursue the same method. If the title be complicated, he may leave a blank page in his book for references to the abstract, and queries to be considered. With some such exceptions he will find it the best and surest method of arriving at a just conclusion, to trust to his view of the title on the face of the abstract itself, without incumbering himself with or relying upon notes. It may sometimes be useful to glance the eye over the abstract in the first place, in order to obtain a general view of the title, and experience will rapidly point out when a subsequent part of the abstract may be looked into advantageously before its proper turn; but speaking generally, an abstract should be perused but once, and that once effectually. The party should never pass on until he thoroughly comprehends what he has already read; the advancing in a difficult title, in order to comprehend what you have passed and do not understand, often leads to insurmountable difficulties.

5. It is the duty of counsel to see that the parcels are correct

in the several instruments, and this particularly should be followed up, step by step, when the descriptions can often be detected and reconciled, whilst upon a *general view* of them it may be deemed impossible to connect them.

6. It should not be taken for granted that the dates are chronologically arranged, but the fact should be ascertained, although this will not, as to new titles, often be important now that a will is allowed to operate on after-acquired property.(b) And now counsel should keep constantly in view the recent statutes altering the law of dower,(c) descent,(d) wills,(e) escheat,(f) illusory appointments,(g) executors,(h) the substitution for recoveries act,(i) the new statute of limitations,(k) the new acts for amending the law of real property,(l) the act to render the assignment of satisfied terms unnecessary,(m) the act for rendering valid defective execution * of powers of leasing,(n) and the other recent acts to which our attention will be called in chapter 12. In most cases he will have to consider the early title with reference to the old law, and the recent title with reference to the new, and some caution will be necessary not to confound them, or the periods over which they operate; and the provision made by statute in favor of purchasers as regards voluntary settlements, and settlements with power of revocation, recoveries, unregistered deeds, bankruptcy, judgments, crown debts,(o) should also be kept in view. In Ireland a landed estate court has been established, with powers to sell and confer an unimpeachable title on purchasers, and even to pronounce a judicial declaration that an owner has a good title.(p)

7. Counsel, as he proceeds in perusing the abstract, should call, in the margin, for evidence of facts which he supposes will

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| (b) Ch. 12, <i>post</i> . | (l) 7 & 8 Vict. c. 76; 8 & 9 Vict. c. 106, <i>post</i> , ch. 12, s. 4. |
| (c) 3 & 4 Will. 4, c. 105, <i>post</i> , ch. 12, s. 1. | (m) 8 & 9 Vict. c. 112, <i>post</i> , ch. 12, s. 4. |
| (d) 3 & 4 Will. 4, c. 106, <i>post</i> , ch. 12, s. 1. | (n) 12 & 13 Vict. c. 26; 13 & 14 Vict. c. 17. |
| (e) 1 Vict. c. 26, <i>post</i> , ch. 12, s. 1. | (o) Ch. 22, <i>post</i> . |
| (f) 4 & 5 Will. 4, c. 23; 13 & 14 Vict. c. 60, s. 46. | (p) 21 & 22 Vict. c. 72. The acts for enabling the grant in England of an indefeasible title, now before parliament, will be found in ch. 12, s. 4, <i>infra</i> . |
| (g) 1 Will. 4, c. 46. | |
| (h) 1 Will. 4, c. 40. | |
| (i) 3 & 4 Will. 4, c. 74, <i>post</i> , ch. 12, s. 2. | |
| (k) 3 & 4 Will. 4, c. 27, <i>post</i> , ch. 12, s. 3. | |

readily be produced; for example, letters of administration, as evidence of intestacy; office extracts from wills, to prove the appointment of executors and probate by them, as such inquiries in the margin will enable him to confine his opinion to points of importance.

8. So where the original documents cannot be obtained, he should, as he proceeds, require to be produced the probate or an office copy of a will affecting a real estate, but not a resort to the original will without some fair ground for suspicion. If it has not been proved, which a will of real estate need not be, of course the will itself should be produced. But now where the validity of a will is disputed in the probate court, the heir at law or devisees may be cited, and thus become parties as to their interests in the real estate; and the decree of the court for or against the will, will bind all parties subject to appeal. And provision is made where the will has not been established for making the probate or office copy of a will evidence in any action or suit relating to real estate, unless the validity of the will is disputed. (g) In a late case it appeared that a bad title was accepted upon an incorrect statement, in the abstract of a will, which statement the purchaser's solicitor neglected to examine with the original. (r) The counsel should also call for office extracts from fines and recoveries, and from awards under inclosure acts, and for a king's printer's copy of a private act. (s) Where the estate is leasehold, or the title is to be shown to a term of * years carved out of the inheritance, which he must consider in point of title as a leasehold, the probate is the proper evidence, for the will itself is insufficient, or an office extract if the probate cannot be obtained. In a title to an attendant term, it is rarely that the probate can be obtained. He must also see that the probates or letters of administration issued out of the proper court, and that the chain of representation is not broken, for an administration to an executor will not carry on the title any more than an executorship will to an administrator. The conveyancer, now

(g) 20 & 21 Vict. c. 77, s. 61-73; 21 & 22 Vict. c. 95. The act for Ireland is c. 79.

(r) *M'Culloch v. Gregory*, 3 Eq. R. 495.

(s) *Brett v. Beales*, 1 Moo. & Mal. 421; *Beaumont v. Mountain*, 10 Bing. 404; 8 & 9 Vict. c. 113, s. 3.

that attendant terms are merged by act of parliament, will probably not be very strict on this head.

9. So certificates of marriages, births, baptisms, should be required to verify a pedigree, and certificates of burial to prove the deaths of parties, and the last receipt or other sufficient evidence of the payment of an annuity or jointure which has recently ceased by the death of the party entitled.(t)

10. As counsel proceeds, he should, where the fact is not stated, inquire in the margin whether the deeds in a register county have been registered, which will be proved by the certificate indorsed; whether bargains and sales have been enrolled within six lunar months, which will be proved by the indorsement; (1) whether instruments executed under powers have been executed properly, and he should point out in the inquiry the proper mode of execution. And in future he must inquire whether wills made in execution of a power since the 1 Vict. c. 26, are attested by two witnesses, and whether they were executed whilst both were present, and whether the signature of the testator was seen by the witnesses. The signature of the testator can hardly now be in a wrong place; (u) he should never rely upon the statement in an abstract, that the instrument was duly executed, unless it is a common deed. The counsel should keep in view the statute enabling a donee of a power where a deed is required, by any common deed with two witnesses to execute the power just as if he had the interest instead of a mere power.(x)

11. He should also make inquiries in the margin as he proceeds, for the purpose of obtaining an answer in the negative; for example, a power to charge a sum of money is stated in abstracting a settlement, * but no trace of its having been executed appears in the abstract. The inquiry should be, Was this

(t) *Wynn v. Williams*, 5 Ves. 130. Transcripts of parish registers may become evidence; *Doe v. Wilkins*, 2 C. & K. 328; see 3 & 4 Vict. c. 92, s. 11-14.

(u) 15 Vict. c. 24; *In re Brown*, 16 Jur. 602.

(x) 22 & 23 Vict. c. 35, s. 12, Sugd. Pow. 8th ed. p. 136, *infra*, ch. 12, s. 5.

(1) The 3 & 4 Will. 4, c. 74, s. 10, renders valid *common recoveries*, although the bargain and sale to make the tenant to the precipe was not enrolled in due time, provided such recovery would have been valid if the bargain and sale had been duly enrolled; but deeds to be operative *under the act* must be enrolled within six months after their execution; s. 41.

power executed? The object of the inquiry is to cast upon the seller and his solicitor the responsibility of stating, and therefore of ascertaining the fact, and for which statement they would be responsible. Such an inquiry has often, moreover, led to the production of a deed which it had been intended to suppress, and it leaves to the seller or his solicitor no excuse for his fraud or negligence, if an appointment really was made, and created an incumbrance still in existence. An answer by the seller's solicitor "not to his knowledge," is not satisfactory; he should apply to his client for information before he answers the inquiry, and, if necessary, search amongst the title deeds.

12. He should direct generally the usual searches to be made; for example, for judgments, writs of execution, crown debts, annuities, and of course the register office, where the estate lies in a register county; but the extent of search must be very much guided by the station and character of the vendor, although we shall hereafter have occasion to consider this matter more in detail; the purchaser should never rely solely upon having the deeds delivered up to him; they would not protect him against judgments or the like, and often not against mortgages, or against an annuitant who might not be postponed, simply on the ground of leaving the title deeds in the hands of the grantor, for, generally speaking, the title deeds are not delivered to an annuitant.(y)

13. He should likewise direct the court rolls to be searched, in order to ascertain that no documents have been omitted; indeed it has been said, as we shall see, that the court rolls are notice to a purchaser; (z) although they cannot be maintained.

14. Where a particular piece of evidence is known to exist, of course the seller is bound to produce it, — for example, a certificate of a marriage, — and the purchaser's solicitor is never directed to search for it; but where it is not known whether there are not suppressed incumbrances, such searches are directed for the purchaser's own satisfaction, and he bears the expense of them, unless the contract goes off by the seller's default or want of title, and then he may recover the expense. A purchaser, if he please, may ask the seller whether there is any incumbrance,

(y) But see *Bernard v. Drought*, 1 (z) Ch. 24, *post*.
Mol. 38.

judgment, crown debt, annuity, or the like,—and may rest upon the statement, if he chooses to depend upon the seller's veracity and solvency. The question, however, should always be asked of the seller *before* the purchaser's solicitor makes any search; for if the answer be in the negative, which the subsequent search proves to be untrue, the seller, it is apprehended, would be bound to pay the expense of the search, for the search would then be proved to have been necessary, not simply * for the purchaser's satisfaction, but for making out the real state of the vendor's title; this, however, is never insisted upon in practice.

15. If a deed was executed by attorney, he should require the production of the power of attorney, and evidence that the principal was alive when the deed was executed by the attorney.(a)

16. It is the duty of the conveyancer, in perusing an abstract, although the labor generally falls upon him upon a reperusal, to consider the evidence necessary to support the title. In general, no difficulty arises. The sort of evidence required to support a title is known to all, and consists mostly of office and attested copies, or extracts, where the originals cannot be obtained; and where it is necessary to prove the root of the title, or any intervening portion of it, without the common evidence of conveyances, mortgages, or wills—leases, land tax assessments, and poor's rates are resorted to, in addition to affidavits of old inhabitants.

17. In examining a title, counsel is constantly compelled to admit evidence which, although it may be satisfactory as a proof of the fact, yet could not be received in a court of justice; for example, upon a question of identity affidavits (1) of old inhabitants are furnished, and if satisfactory, the purchaser is bound to accept the title, yet the affidavits could not be used in support of the title; they, however, prove the fact and show that living persons can at that time establish it.(b) On the other hand, in receiving evidence admissible at law, counsel is compelled to submit the latter to a severer test than it would be subject to

(a) Ch. 14, s. 1, *post*.

Moulton v. Edmonds, 6 Jur. N. S. 305; 29

(b) Scott v. Nixon, 3 Dru. & War. 388; L. J. N. S. 181.

(1) See 17 & 18 Vict. c. 125, s. 48, as to compelling persons to make an affidavit.

upon an ordinary trial, for it is not a contest between two litigants which has the better title, but a calm consideration by a man in his chambers, whether the seller's title is a safe one against all the world.(c)

18. What is evidence of documents relating to the title of freehold, copyhold, or leasehold estates is fully set forth in the valuable treatises on evidence which we possess, under distinct heads; (d) and so is the evidence necessary to establish the facts of marriage, issue, legitimacy, and identity, or the facts upon which presumptions may be made; and it is truly observed by a late writer who collected and commented on them, that the numerous decisions in the Lords upon these latter subjects are authorities important to the conveyancer.(e)

19. The rule in practice is not, without sufficient cause, to require the formal evidence which would be necessary in an action; therefore a seller is never required to verify the signatures of stewards to copies * of court-roll, or of clergymen to extracts from registers, or to prove the execution of deeds however modern, which appear to have been regularly executed, or that possession was enjoyed under leases produced. Counsel constantly receive imperfect evidence of death; for example, letters of administration; and in pedigrees, dissenters' registers, or affidavits of strangers to the family, whose evidence could not be received at law,(f) but it has been judiciously suggested that declarations of relatives which in course of time may become muniments of title, should be obtained in preference of others.(g) It seems clear, upon the great authority of the opinions in the Berkeley Peerage case, that such evidence would be admissible in due time.(h)

20. In regard to the weight given to the evidence when admitted, although, for example, after seven years' absence without tidings, the death of a person may be presumed as between adverse litigants, and if the presumption be erroneously made, the party really entitled may recover back the estate, yet for that

(c) Hub. Suc. 62.

(d) Phil. Ev.; Stark. Ev.; Hub. Suc. Tayl. Ev.

(e) Hub. Suc. 63.

(f) Webb v. Haycock, 19 Beav. 342.

(g) Hub. Suc. 69.

(h) Berkeley Peer. Case, 4 Ca. 401; *sed vide* Walker v. Ly. Beauchamp, 6 C. & P. 552, *cont.*; Reilly v. Fitzgerald, Drury, 122, *acc.*; Gee v. Ward, 7 El. & Bl. 509; Shedden v. Patrick, 2 Swa. & Trist. 187.

very reason no such presumption could be made between vendor and purchaser. So courts of equity, as between the parties, sometimes act upon the presumption that a woman of an advanced age is past child-bearing, but no such presumption would be made against a purchaser.

21. But as between even a vendor and purchaser presumptions may be made in proper cases of a conveyance of the legal estate, or of a surrender of a legal term,⁽ⁱ⁾ or even of a grant from the crown.^(k) And of course a custom of a manor to warrant the creation of estates tail may be presumed or found from the dealings with the estate sold.^(l)

22. Negative evidence, if in the seller's possession, must be produced, *e. g.* an heir claiming because the will does not pass the estate, must produce the will, yet, as we shall see, the purchaser may not in all cases be able to obtain a covenant to produce such evidence in order to satisfy a subsequent purchaser.^(m) Where there are several deeds, for the purpose of not implicating a purchaser in the disposition of the purchase money, and the receipts of the trustees are made discharges, he cannot require the production of the separate deed disposing of the purchase money; and now indeed it is not necessary to do so.

23. Pedigrees are generally readily proved, where the possession has gone according to them; the difficulty arises where a person claims as heir under a long pedigree, which has no other connection * with the title.⁽ⁿ⁾ Long practice makes men particularly cautious in accepting such a title, for it is often as difficult to point out a defect in it where there is no contest, as it is to defend it where there is; for a question of identity, legitimacy, seniority, or a failure of issue, may at once destroy a pedigree when the real claimant appears, although on the face of the pedigree all appeared to be correct; and in some cases portions of the real pedigree have been fraudulently omitted, and in others the registries themselves have been fraudulently altered.^(o) Counsel, therefore, cannot be too much upon their guard; and yet, unless some reasonable doubt can be thrown on

(i) *Hillary v. Waller*; *Emery v. Grocock*, *sup.*

(m) *Inf.* next section.

(k) *Gibson v. Clarke*, 1 J. & W. 150, *sup.*

(n) *Davies v. Lowndes*, 7 Sco. N. R. 140, as to how far a pedigree itself is evidence.

(l) *Goold v. White*, Kay, 683.

(o) See *supra*, s. 1, pl. 32.

the pedigree, the purchaser may be compelled to take the title, and the very circumstance of resisting the seller's right may lead to a claimant. *(p)* In tracing a pedigree, the late act altering the law of descent should be kept in view, as it in many cases alters the descent. *(q)* In the case of a purchaser, evidence that a father stated that his property would be divided between his daughters was deemed satisfactory evidence that his son was then dead, and it was presumed that he was not married, as there was no evidence that he was so. *(r)*

24. Recitals in deeds of a pedigree are entitled to great weight *where the possession is enjoyed according to the pedigree*; *(s)* but in a case *(t)* where, after estates for life an estate tail was created by a will dated in 1732, and the first tenant for life died in 1747, and trustees in the will under a power entered into possession to raise a legacy, and in 1750 created a term of years by way of mortgage to secure what remained due, and until 1793 no person entitled under the will enjoyed the estate or made any claim to it; but in that year certain persons residing abroad claimed as issue in tail, and executed deeds in which their title under the will, in default of issue of a previous devisee, was recited, and by which deeds, and a fine and recovery, they conveyed to a purchaser in fee, and the purchaser afterwards obtained an assignment of the mortgage term from the personal representative of the mortgagee, and the possession, from 1793 to 1826, a period of thirty-three years, had remained undisturbed; upon a bill filed for a specific performance against a subsequent purchaser, the master thought the title bad, and the court confirmed his opinion; for the recitals, whatever effect they might * have against the parties to the deeds, could not, as against third parties, be any evidence of the pedigree. If evidence had been given that possession had followed and accompanied the pedi-

(p) See *Crouch v. Hooper*, 16 Beav. 182.

(q) *Post*, ch. 12; *Coster v. Baring*, 2 Eq. R. 811. The new act for registering births is 6 & 7 Will. 4, c. 86, and the new marriage acts, 6 & 7 Will. 4, c. 85; 19 & 20 Vict. c. 119.

(r) *Hemming v. Spiers*, 15 Sim. 550; there was some further slight evidence.

(s) *Slaney v. Wade*, 1 My. & Cra. 338;

Doe v. Davies, 10 Q. B. 325; *Bringloe v. Goodson*, 5 Bing. N. C. 738, as to recitals binding the parties to the instrument; *Cowell v. Chambers*, 21 Beav. 619, recital of death in private act of parliament not sufficient; see *Moulton v. Edmonds*, 1 De G., F. & J. 246. As to recitals, *Monypenny v. Monypenny*, 9 H. L. Cas. 135.

(t) *Fort v. Clarke*, 1 Rus. 601.

gree, if between 1747 and 1793 a possession had been shown passing from father to child under the entail created in 1732, that enjoyment would have been a strong circumstance to prove that the persons named in the pedigree did, in fact, fill the characters which it was in 1793 alleged that they did fill. With nothing but the recitals of the deeds executed in 1793, the conveyance to the purchaser, and the subsequent enjoyment under that conveyance, with no proof of the pedigree on which the title depended, or of possession from 1747 to 1793, according to that pedigree, the court could not say that this was a title which a purchaser would be compelled to accept. It was, we observe, a title made through tenants in tail claiming by descent who had not been in possession for a considerable period prior to 1793, and there was no proof of the pedigree except in the recitals in the deed executed in that year.

25. Of course every link in the chain of the pedigree should be proved, as the marriage of the parents and the baptism of the son, and the certificate of the burial of the father, or the probate of his will, or letters of administration to him, in order to prove the son's right to an estate by descent from his father; and, where she was dowable, proof of the mother's burial and the discharge of her arrears of dower, if recently dead, should be required, and inquiry should be made after any settlement executed by either father or son. The proof of failure of issue of an elder branch, as of a first son, is often slight and depending upon affidavits; but weight may be given to such evidence where the possession of the estate has gone with the pedigree produced.

26. The new registers will, in most cases, supply what the old registries did not, the time of birth of the parties; but considering how wide a door this opens to fraud, it will not hereafter be safe to place too much reliance upon them.(1)

(1) The 14 & 15 Vict. c. 99, s. 14, 15, makes examined or certified copies admissible in evidence of any document of such a public nature as to be admissible in evidence on its mere production from the proper custody; see *Dorritt v. Meux*, 11 C. B. 142; *Scott v. Walker*, 2 Q. B. 555. Under which statute, the court has admitted extracts from parish registries of entries of marriages, baptisms, and burials, purporting to be signed by the incumbents, without further verification. *In re Neddy Hall's Estate*, 9 Hare App. 16. This is somewhat dangerous. It is usual for rectors and incumbents to sign simply A. B., rector. Lord Cranworth observed, that solicitors would save

27. In the case both of sales under powers and sales by mortgagees, where the operation of the 23 & 24 Vict. c. 145, is not negatived by * the instrument creating the power or mortgage, that statute may be found to contain provisions which will facilitate the sale.

28. Presumptions of marriages, and therefore of legitimacy, and of deaths without issue, may often be made in a court of law between contending parties, where a purchaser would not be compelled to take such a title,^(u) and yet the court has directed the seller's pedigree to be tried in an issue between him and the purchaser.

29. A title by descent has been considered a highly objectionable one,^(x) but this must depend upon the want of sufficient evidence of the pedigree, or of negative evidence that no settlements or mortgages of the property have been made. If the pedigree is proved, and there is no sufficient ground to suppose that some settlement or mortgage has been suppressed, it is a title which a purchaser would be compelled to accept. The new law of descent must now be kept in view, and particularly the evidence necessary to satisfy a purchaser that the person in the pedigree called the first purchaser did not take by descent.^(y) A title without title deeds is not one which can be accepted without satisfactory proof that there has been such a long uninterrupted possession, enjoyment, and dealing with the property as to afford a reasonable presumption that there is an absolute title in fee simple. But with such proof, a purchaser may be compelled to take such a title. Of course there are many good titles of which the origin cannot be shown by any deed or will.^(z)

30. In a case heard in 1859, the title began with a conveyance in 1779, which was produced, and then followed several conveyances down to one in 1797 to a purchaser in fee, but none of

(u) *Supra*, ch. 10.

6 Cl. & Fin. 163; *Wrigby v. Holdgate*, 3

(x) 1 Pres. Ab. 255; Hub. Sup. 71. As C. & K. 158.

to evidence of access, see *Morris v. Davis*, (y) *Post*, ch. 12, s. 1.

(z) *Cottrell v. Watkins*, 1 Beav. 361.

themselves and the court much trouble, and their clients expense, if in all such cases, to the names of the person signing the extract, the words "of the aforesaid parish" were added; 2 De G., M. & G. 748.

them was produced ; in 1798 this purchaser bought the land tax, and the certificate described the property as belonging to him. The court considered the title to be good as depending on seisin, possession, acts of ownership, and uninterrupted enjoyment. The missing deeds were proved by secondary evidence, viz., drafts of the deeds, and proof of the engrossment and execution, from the books of a deceased solicitor ; the books were produced in court, and there was an affidavit verifying an extract from them. The purchaser's claim to have the books delivered to him, or a covenant for their production by the holder, was overruled, for such a right would render lands unsaleable, wherever by an accidental fire recent deeds conveying property had been destroyed. It was, the court said, the established practice of conveyancers to consider pedigrees proved by extracts entered in family bibles and entries in surgeons' books, which are not handed over with the documents, and identity of premises is proved * by maps which are not handed over to the purchaser.(a) Of course, we may observe, a purchaser, as the largest proprietor, may be entitled to the custody of the maps with the other documents.

31. In the same case, a conveyance in 1815 from the assignees of the purchaser in 1797, who had become a bankrupt, and his mortgagee to a purchaser recited several mortgages by the bankrupt, and transfers, and ultimately the transfer to the mortgagee, the party to whom the purchase money was paid ; several of the recited deeds were missing, but searches proving their loss, and the recitals, and an old abstract were relied upon in favor of the title, and the purchaser was compelled to take the title. The court did not rely upon the statute of limitations, but considered the peril of the deeds having been deposited with some one as a security for a loan as imaginary. Forty-four years had elapsed since there could have been any such fraudulent deposit by way of equitable mortgage, and if any such mortgagee should now start up, he would have formidable difficulties to encounter in explaining his laches, and in overcoming the statute of limitations.

32. Declarations of persons in support of a title have now more force if made under the 5 & 6 Will. 4, c. 62, s. 18 ; but

(a) Moulton v. Edmonds, 6 Jur. N. S. 305.

such a declaration by the seller alone would not, of course, be such evidence as a purchaser would be bound to accept,(b) for he cannot himself prove a fact upon which the title depends.

33. The certificate of a stockbroker, that a fund stands in the books of the bank, is not sufficient evidence of that fact as against a purchaser.(c)

34. Upon a reference as to title, the master often acted upon the opinion of a conveyancer; but he was not allowed in his report to state an opinion of counsel as the foundation of his finding.(d) Now, as we have seen, whenever it is deemed necessary the abstract will be submitted to one of the counsel appointed by the court.(e)

35. We have seen that a purchaser is not bound by the acceptance by his counsel of a bad title, although he may bind himself by acquiescence to a waiver by his counsel of objections.(f) And we shall hereafter see that neither counsel nor solicitors are at liberty to communicate to others any knowledge which they may acquire whilst acting for the purchaser, nor are they at liberty to communicate to others any defect in the vendor's title if the purchase do not proceed.(g)

* SECTION III.

OF THE ABSTRACT, AND OF COMPARING IT WITH THE DOCUMENTS.

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| <ol style="list-style-type: none"> 1. Abstract when complete. 2. } 4. } Although incumbrances exist. 3. Effect of facts which require evidence. 5. Where the contest is whether the legal estate is outstanding. — Where it is admitted. 6. Tenant in tail need not bar the entail before completion. 7. Abstract to show a good title. — Exception under conditions. 8. No inquiry in suit whether perfect. | <ol style="list-style-type: none"> 9. Acceptance of abstract. 10. Restricted abstract by contract. 11. Of the title of a tenant in common. 12. For what purposes abstract delivered. — Purchaser's property in it. 13. Right to opinion. 15. Seller to produce the deeds. 16. Place for examination. 17. At a third person's. — At a distance, seller to pay expense. — So in sale by court. |
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(b) *Hobson v. Bell*, 2 Beav. 17.

(e) *Sup.* p. 354.

(c) *S. C.*

(f) *Sup.* p. 345.

(d) *In re Collard*, 10 Beav. 334; see *Flower v. Walker*, 1 Rus. 408.

(g) *Post*, ch. 24.

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| 18. Agent in London to examine abstract.
19. Southby v. Hutt; verifying abstract.
20. Purchaser not bound to go to record offices.
21. Grant from the crown; impropriate tithes; tithe rentcharges.
22. Notice to purchaser of place of production.
23. Seller having covenant to produce deeds must produce them. | 24. Promise to produce deeds.
25. Deeds burned after examination.
26. Copies of court roll.
27. Abstract to be examined before purchaser act as owner.
28. Expense of examination where no title.
29. Purchaser neglecting to call for deeds for examination.
30. Expense of contract includes making out title. |
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1. THE abstract(1) ought to mention every incumbrance whatever affecting the estate, and should, therefore, contain an account of every judgment by which it is affected; (a) but equity considers it *complete* whenever it appears, that upon certain acts done, the legal and equitable estates will be in the purchaser; which may be long before the title can be completed. (b) And even at law, where a tenant was described in the contract as in possession under a lease, which operated merely by estoppel, as the mortgagee did not concur in it, the title was deemed good, as the seller was ready to procure a reconveyance from the mortgagee, so that the lease might operate in interest. (c)

* 2. And where at law the seller was bound to deliver an abstract of title within a time named [which he did], and deduce a good title to the estate, and a time was named for the completion of the contract, from which time the purchaser was to be entitled to the rents, and if from any cause the purchase should not be completed by the day, the purchaser was to pay interest till the completion, the seller was held to have performed the agreement on his part, although the abstract showed mortgages, and no notice had been given to the mortgagees to pay them off, and there was no personal representative to a deceased mortgagee, for it showed a good title to the equity of redemption, and the mortgages could be paid off out of the purchase money, and the vendor had not bound himself to convey the estate by any par-

(a) Richards v. Barton, 1 Esp. 268.

(c) Webb v. Austin, 8 M. & W. 419;

(b) 8 Ves. 436; 1 J. & W. 421; Morley v. Cook, 2 Hare, 106; Jumpson v. Pitchers, 1 Col. 13. 7 Man. & Gra. 701, which seems to be rightly decided notwithstanding the reporter's n. 728.

(1) An abstract of title may possibly be secondary evidence of a deed referred to in the abstract, when it is proved to have been made at the time of sale and purchase, and in the course of business; per Ld. Campbell C. J. 6 Ex. 606.

ticular day.(d) This decision seems rather to have anticipated the law admitting equitable defences.

3. It has been said that if a vendor delivers an abstract deducing a title by deeds, &c., the verification of the abstract with the deeds is a mere question of evidence, and the title is made out by the abstract as delivered. But that where facts are alleged in the abstract which require evidence, oral or documentary, to prove them, which evidence is not produced, the production of the evidence necessary to prove such facts constitutes a question of title. Instances were given of the necessity of proving a statement as to the identity of a former owner of the property, or as to the identity of parcels where the description in the deeds varies from that upon the sale — until the evidence is furnished, a good title has not been shown. It is necessary to examine the nature of the facts alleged upon the abstract, and determine whether their truth would necessarily appear from a mere verification of documents stated, or whether it must be shown by further evidence.(e) According to this view there is probably no abstract ever delivered which can be held to show a good title. Mere questions of identity of person or parcels, when the possession has been held under the title in the abstract, are considered in practice as requiring verification only, and are not treated as matters which prove that the abstract did not show a good title, although the conduct of the vendor in clearing up the points may affect the question of either interest or costs. Since writing the above observations, the decree has been reversed.(f) The meaning of the usual decree is, as to the first inquiry, whether a good title can be made, not only that the vendor shows *on his abstract*, such documents and facts, that if the documents are produced, and the facts proved, he has a good title, but that the vendor has shown that * he can procure the documents and prove the facts; but as to the second branch of the inquiry, it means, when was a good title first shown *on the abstract*; and if on the face of the abstract the vendor has shown a sixty years' title, and if, for the purpose of supporting that title, it is necessary to show that such a person died intes-

(d) *Savory v. Underwood*, 23 L. T. 141. (f) 5 De G., M. & G. 517; 2 Eq. R.

(e) *Sherwin v. Shakspeare*, 17 Beav. 957.

267; per M. of Rolls.

tate, or any other fact—if the facts are alleged with sufficient specification on the abstract, then that abstract *shows* a good title, although the proof of the matters shown may be the subject of ulterior investigation.^(g) Therefore, where a vendor at first insisted he was not bound to show the death of certain persons, and did not allege them on his abstract till a later day, it was held that he did not show a good title till that day.^(h)

4. It may still therefore be stated, that although the estate is sold free from incumbrances, and the abstract shows an amount of incumbrance exceeding the purchase money, yet it must be considered that the seller can make a good title; ⁽ⁱ⁾ for although the seller and the purchaser are both mortgagees, the former must pay off *all* the incumbrances.^(k) Nor can any objection be made on the ground of an incumbrance where the incumbrancer may be brought in and be compelled to join in the conveyance,^(l) nor to the want of registry of any deed, for where there is no other subsequent purchaser who has registered his conveyance, the objection is capable of being removed at any time before the completion of the purchase,^(m) but of course the objection must be removed in due time.^(m¹) This rule is properly confined to cases where the seller, and persons who are trustees for him, can make a title; for if the concurrence of a stranger is necessary, and he is not bound to join, the abstract cannot be deemed perfect until it shows that he has given perfection to the title.⁽ⁿ⁾ If the estate be vested in a person, not for the purpose of securing a right, but for the purpose of enabling that person to perform a duty to others, then until that duty has been performed there can be no right to call for a conveyance.^(o)

5. Where the contest was whether the legal fee was outstanding or not, which depended upon the construction of certain instruments, *the vendor, relying upon the title as vested in himself,*

(g) *Parr v. Lovegrove*, 4 Drew. 170, *per Cur.*

(h) *S. C.*; *Bridges v. Longman*, 24 Beav. 27.

(i) *Townsend v. Champenown*, 1 Yo. & Jer. 449.

(k) *Att. Gen. v. Cox, or Pearce*, 3 H. L. Cas. 240.

(l) 2 Mol. 583.

(m) Ch. 9, *sup.*

(m¹) [*See Bartlett v. Blanton*, 4 J. J. Marsh. 428, cited *post*, 433, note.]

(n) *Lewin v. Guest*, 1 Rus. 325; 2 Mol. 583.

(o) *Sidebotham v. Barrington*, 3 Beav. 525.

did not undertake to show who was the representative of the alleged trustee, and Lord Gifford held the question to be matter of title and not of conveyance,^(p) but that does not touch the common case. In a later case * the master reported that a good title was shown prior to the filing of the bill, and, afterwards, upon a new reference, he came to a different conclusion, upon the ground that the original abstract was silent as to the death of a trustee in fee, and did not state an assignment long prior to the suit, to the trustee of the fee, of the mortgage money secured by a term of years, nor did it state letters of administration granted to the trustee and equitable mortgagee before the suit, and in consequence of the death of the administrator, administration *de bonis non* had been granted subsequently to the master's first report; it was held by Shadwell V. C. that this was matter of conveyance and not of title. He said that when an abstract shows that the equitable title is vested in the vendor, and that the legal estate in fee and a mortgage term are outstanding in certain persons, it shows a good title, and though the owner of the legal estate in fee, or the termor, and the person representing him may subsequently die, yet that a good title is shown when it is shown that the vendor has the whole equity, and *in what person* the outstanding portion of the legal estate is vested.^(q) The facts show that the latter expression is not to be taken literally, because the first abstract did not show in what person the outstanding legal estate was vested. But it showed in whom it was originally vested, and the tracing of the descent, and of the vesting of the term, was held to be matter of conveyance only. This seems to be quite right, and is in accordance with the practice in my time; it was never deemed an objection to an abstract, as a sufficient one, that it did not show who was the real representative of a deceased trustee, and now that a conveyance can be so readily obtained under the new trustee acts,^(r) where an heir cannot be found, the practice is open to still less objection. But in a case like *Wynne v. Griffith*, it is properly a question of title, for there the question is not, who is the heir of an acknowledged trustee, but the contest is, whether any such trustee ever existed, or, in other words, whether

(p) *Wynne v. Griffith*, 1 Rus. 283.

(r) *Supra*.

(q) *Avarne v. Brown*, 14 Sim. 303.

the legal estate really is outstanding, and in that case, after the opinions of two courts of law,(s) it was decided that the legal estate was not outstanding.

6. It has been decided that a seller who is tenant in tail, and can, by a disentailing deed acquire the fee, can make a good title, so as to support the master's report to that effect, although he has not yet barred the estate tail and remainders over. This seems quite right, for it would be unreasonable to require the seller to bar the estate tail before the contract is completed; but the case cannot, as the learned judge seemed to suppose, be compared to the common case of an owner in fee, because, although the contingency of the *seller's death before the conveyance is common to all cases, yet, in this case the *contract* would not bind the issue in tail or remainderman; still this is a hazard which a purchaser may properly be required to run.(t) An abstract, therefore, showing the capacity of the seller thus to acquire the fee, will be deemed complete.

7. A condition that the vendor shall deliver an abstract of title to a purchaser, means the delivery of an abstract showing a good title.(u) But even a condition to furnish a "full and sufficient abstract of title," with a stipulation that all objections not delivered in writing within a month should be deemed to be waived, means only a full and fair abstract of all the muniments which the seller has in his possession, power, or knowledge, and a fair statement of the deduction of his title, though it did not go back for sixty years, and do not show a good title. The terms "full and sufficient abstract of title" could not mean a full and sufficient marketable title, otherwise there would be no reason for the stipulation requiring all objections to be taken within the month.(x) In one case (y) where the vendors were to deduce a good title and deliver an abstract of title within two months, on application being made by the purchaser, and within six weeks of the delivery of the abstract all objections were to be delivered in writing, or the title was to be considered as accepted, the master of the rolls said that the condition was dis-

(s) 3 Bing. 179; 5 B. & C. 923.

(x) *Blackburn v. Smith*, 2 C. & K. 561;

(t) *Cattell v. Corral*, 4 Yo. & Col. 228; 2 Ex. 783.

infra, ch. 12, s. 2.

(y) *Sherwin v. Shakspeare*, 17 Beav.

(u) *Sharland v. Leifchild*, 10 Ad. & El. 267.

tinct, that the vendors should deduce a good title and deliver an abstract of title within two months, that is, an abstract showing that title. \ But this does not seem to be the true construction, although, of course, the vendor must ultimately make good the title. It has since been decided on appeal,(z) that the phrase "within two months" applied to the delivery of the abstract, and not to the deduction of the title. The parties contemplated the possibility of a title, imperfect at first, or an abstract originally defective.

8. The ordinary rule of the court does not authorize an inquiry in chambers, whether the abstract was perfect, and if deficient, in what respect its deficiencies consisted, and whether it was ever perfected.(a) We have already seen what the usual reference is as to title.(b)

9. Although, as we have already seen, the purchaser accepts an abstract as showing a satisfactory title, yet he is not precluded from showing by other evidence that the title is a bad one.(c)

10. We have before seen how unwillingly the courts hold a limited * obligation to produce deeds to amount to a condition to accept the title though unmarketable.(d)

11. And even if two persons be tenants in common, and hold under the same title, as in the case of partners buying real property, or holding such property bought by one of them, a contract to sell by the representatives of the one to the survivor, with a stipulation that the sellers should deliver to the purchaser at their own expense "an abstract of their title," means an abstract of the *general* title, and it is not to be confined to the acts of the deceased partner, and the title under him, although the purchaser was bound by the contract to purchase subject to all imperfections of title before the commencement of the title of the deceased partner; (e) so that a man may be entitled to an abstract of the title, and yet be compelled to accept the title itself as it stands.(f)

12. The abstract is delivered for the following purposes: that

(z) 5 De G., M. & G. 517; 18 Jur. 843.

(d) Ch. 9, s. 1, *sup*.

(a) *Bennett v. Rees*, 1 Ke. 405.

(e) *Morris v. Kearsley*, 2 Yo. & Col.

(b) *Sup.* ch. 5, s. 4; ch. 9, s. 2.

139; see *Phipps v. Child*, 3 Drew. 709.

(c) *Shepherd v. Keatley*, 4 Tyr. 571;

(f) 4 C. B. 49.

sup.

the purchaser may see whether the title is good, and he has also a right to it after he has taken an opinion, in order to take another opinion in case he is not satisfied with that, and for the purpose of taking further objections, and of further considering the title; and it is to assist him in preparing his conveyance.^(g) As to the general property in the abstract, while the contract is open, it is neither in the vendor nor in the vendee absolutely; but if the sale goes on, it is the property of the vendee; if the sale is broken off, it is the property of the vendor. In the mean time the vendee has a temporary property, and a right to keep it, even if the title be rejected, until the dispute be finally settled, in order to show on what ground he did reject the title.^(h) If the purchase go off, not only is the abstract to be returned, but no copy to be kept; ⁽ⁱ⁾ and although the purchaser pays for the opinion, yet that ought, it should seem, to be returned with the abstract; of course this applies only to an opinion written on the abstract; but Mansfield C. J. considered it quite clear that the opinion of counsel written at the foot of the abstract belonged to the purchaser, and that he was entitled to have that back again even if the abstract could be retained.^(k) If the purchaser return the abstract to the seller to answer the queries and opinion of counsel, he may maintain trover against the seller for the abstract, although the seller himself might ultimately be entitled to the abstract. The temporary property of the purchaser in the abstract was sufficient to enable him to maintain the action.^(l)

13. Where a motion was made on the part of the vendor to compel * the production of the abstract of a title, *with the observations made thereon by the purchaser's counsel, and the replies thereto of the vendor's counsel*, the vice chancellor held "that if an abstract delivered to a purchaser be returned with the observations of counsel to the vendor, in order that the vendor's counsel may reply to them, the vendor has a right to compel the production of *all that passed between them in that way.*" If the purchaser obtain a private opinion for his own information, and allow this to be inserted in the margin of the abstract, he throws

(g) See 2 Taunt. 276, per Mansfield C. J.

(h) 2 Taunt. 278, per Chambre J.

(i) 2 Taunt. 277, per Lawrence J.

(k) 2 Taunt. 270; *Alexander v. Crossbie*, 2 Ir. Eq. R. 143.

(l) *Roberts v. Wyatt*, 2 Taunt. 268.

into the general heap that which would otherwise have been his own private property; and the vendor must have the abstract, *with all the observations when it was last sent back by him to the purchaser's solicitor, and all subsequently written on it*, except the opinions of counsel procured by the purchaser for his own private information. It will be referred to chambers to report what is private, and this part must be erased from the abstract; or, without a reference, the purchaser may erase what was procured for his own private information, the erasure being made on affidavit.^(m)

14. It does not appear in what stage of the proceedings this motion was made. It seems clear that neither party can withhold from the other, in his turn, the abstract with everything written on it by way of answer and inquiry on both sides during the investigation. It cannot be often that a purchaser takes what can properly be called a private opinion, for that it should seem could only be where he seeks advice for his personal guidance in completing or avoiding the contract; and if such an opinion has been inadvertently written on the abstract; and has not been communicated to the seller, it may be right to allow the purchaser to erase it either during the investigation or after it is abandoned for want of title. A case can seldom arise in which a solicitor for a purchaser would be justified in making a copy of the abstract, nor is a purchaser entitled to retain a copy of the abstract, if the contract is put an end to.⁽ⁿ⁾

15. The seller is bound to produce the deeds in order that the abstract may be examined with them, although they are not in his possession, and the purchaser will not be entitled to the custody of them.^(o)

16. A question often arises as to the place at which the deeds should be produced. A production at the seller's country seat where the estates lie, or at his known residence elsewhere at the time of the contract, could not, it should seem, in general be objected to, and if the deeds are in London, that would be the proper place to produce them: this could hardly be deemed a surprise upon a purchaser, because it is generally known that many title deeds are, at least preparatory to a sale, lodged in the hands of town solicitors.

(m) Wood v. Court, V. C. H. T. 1827, (n) 2 Taunt. 276, 277.
2 Atk. Con. 620. (o) Post, pl. 23.

* 17. But provided the purchaser's expense is not increased, the seller may perform his obligation by procuring the purchaser an inspection of them at the residence of any third person; for example, of the person entitled to hold them in respect of other estates, or of an incumbrance. Where some of the deeds are in the seller's possession, and some in a third person's, a purchaser would not be allowed to object to attend at several places if they were within a reasonable distance. But if the deeds, or any of them, are in the custody of other persons living at a distance from the place where they ought to be produced, the purchaser must send there to have them examined, but the seller must pay the expense of the journey—that is, the additional expense,—for let the deeds be where they may, the purchaser would have to examine them at his own expense. This was so ruled in a case before the master, (*p*) upon a sale by assignees of a bankrupt. A settlement of 1763 was in the possession of a former purchaser, and there was only a covenant to produce a copy. A bill was filed by the assignees for a specific performance. The purchaser was informed that the settlement was in the possession of a gentleman in the country, and *might be seen there*. He was ready to covenant to produce it. The purchaser submitted to the master, that it was the duty of the sellers to produce the deeds stated in the abstract before the master, or to the purchaser's solicitor in London. The master stated, that he would make inquiry of conveyancers, what the practice in such cases was, and afterwards decided that the purchaser's solicitor ought to send to Baldock, where the deeds were, to compare the abstract with the settlement, but that the sellers ought to pay the expenses of the journey. Upon a sale by the court, the vendor must be at the expense of the purchaser's solicitor going from place to place to compare the abstract with the deeds, and the purchaser is not bound to send the abstract to an agent in a country town in order that he may compare the abstract with the deeds. (*q*)

18. But the rule is, that the agent in London of the country attorney of the purchaser should examine the abstract with the deeds where they are in London, and therefore the client, the purchaser, cannot be charged for the country attorney's journey,

(*p*) *Sharp v. Page*, Rolls, 1815, MS.

(*q*) *Hughes v. Wynne*, 8 Sim. 85.

&c., to London to make the examination, not even if he undertook it at the request of the client, unless he distinctly informed the client that it was not by the usage of the profession considered to be necessary that such expense should be incurred.(r)

19. The seller may be bound to verify the abstract, although there is an ambiguous provision in the condition as to the delivery of the deeds.(s)

*20. If a seller cannot produce the originals, as in the case of wills and records, he cannot require the purchaser to send round to the different offices to examine the abstract with the originals, or with the records, even where that will be permitted by the rules of the office, although he (the vendor) is willing to pay the expense of the attendances, but he must procure office copies or extracts, as the case may require, in order to enable the purchaser's solicitor to examine the abstract with them, and to lay them before his counsel if it should be deemed necessary.(t)

21. Where a grant from the crown is the foundation of the title, although the seller claims the fee free from charges, a purchaser is anxious to have an office copy of the grant, in order to ascertain whether any rents were reserved by it, and whether it was upon any condition or the like; but if the seller's solicitor searches for it, and informs the purchaser where the grant is to be found, the latter must be content to have it examined by his own solicitor at the office where it is kept. This generally arises upon titles to impropriate tithes. And now, although impropriate tithes may be merged,(u) or a rentcharge substituted for them,(x) yet the practice will remain unaltered, because no greater interest would merge than the party had, and the rentcharges are subject to all the incumbrances to which the tithes themselves were liable.(y)

22. A condition avoiding a sale, if the seller do not verify the same by the production of the deeds to the purchaser at Norwich, at Lynn, or in London, before a day named, makes it

(r) *Alsop v. Ld. Oxford*, 1 My. & Ke. 564.

(s) *Southby v. Hutt*, 2 My. & Cra. 207; 8 Sco. 551.

(t) See 14 & 15 Vict. c. 99, s. 14; *sup.* s. 2, pl. 26, n.

(u) 6 & 7 Will. 4, c. 71, s. 71; 1 & 2 Vict. c. 64.

(x) 6 & 7 Will. 4, c. 71.

(y) *Ib.* sect. 71.

incumbent on the seller to give notice to the purchaser at which of the places he would be ready to produce such title.(z)

23. If the seller have only a covenant to produce the deeds, yet he must procure the production of them. If the purchaser went to inspect the deeds, the holder might refuse to produce them to him, and would not be liable to an action of covenant for non-production. The law supposes that every vendor has the deeds in his own hands, and in his power to produce.(a) This has always been the practice.

24. If the seller's attorney state that, if required, the deeds, although in the hands of a third party, will be applied for, the purchaser, although he prepare and engross his conveyance, which is executed, will not be bound to complete his purchase unless the deeds be produced.(b)

25. Where a purchaser's solicitor examined the deeds for the purpose of comparing them with the abstract, and the deeds were afterwards * accidentally burnt before the title was accepted, it was held that it could not be imputed to him as culpable negligence that he did not inform himself of the attesting witnesses to the deeds, and the purchaser was not bound to complete the contract.(c)

26. In the case of a copyhold estate, the copies of court-roll are the documents of title, or, in common parlance, the "title deeds." The purchaser is entitled to have them furnished to him just like other documents of title: (d) if the seller is entitled by stipulation, or in respect of other estates to retain them, the purchaser is still entitled to their production, in order that the abstract may be examined with them.(e)

27. The purchaser should not deal with the estate in any manner as owner until the abstract has been examined with the deeds. For although the abstract be negligently prepared, yet in the absence of fraud the seller will not be answerable, because the purchaser himself, by exercising ordinary care, may avert any loss from the seller's negligence. Therefore if an abstract show a good title, and the purchaser resell at a profit, and upon

(z) *Rippingall v. Lloyd*, 2 Nev. & Man. 410.

(c) *Bryant v. Busk*, 4 Rus. 1.

(d) *Infra*.

(a) *S. C. sup.* pl. 16.

(e) 14 & 15 Vict. c. 99, ss. 14, 15; *sup.*

(b) *Jarmain v. Egglestone*, 5 C. & P. 172.

s. 2, pl. 26, n.

an examination of the deeds it turn out that the title is bad, and he has to pay the second purchaser his costs of investigating the title, he cannot recover them over, nor could he recover the costs of the resale or any damages.(f)

28. And as the comparison of the deeds with the abstract should be made early, the purchaser will be entitled to the expense of the examination and of journeys for that purpose, if ultimately the seller cannot make a title.(g)

29. If an abstract of surrenders or the like (h) be produced, and not objected to by the purchaser, the production of the abstract unimpeached is tantamount to the production of the surrender. Nor can a purchaser who has not called for the deeds raise an objection for want of their production, so as to throw the costs of the suit on the seller.(i) And we have already seen, that although the time fixed for delivery of the abstract is imperative at law, yet in equity, with reference to time, it is nearly as incumbent upon the purchaser to call for the abstract as it is for the seller to deliver it.(k)

30. We may close this section with the observation of a learned judge, that a stipulation that the purchaser shall bear the costs of the contract would entitle the vendor to the costs of making out his title.(l)

*SECTION IV.

OF A PURCHASER'S RIGHT TO THE DEEDS.

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| 1. Title deeds go with the inheritance. —
Pledge by seller of conveyance, an
escrow.
2. Right of purchaser to follow the deeds.
3. Deeds left with purchaser to prepare
conveyance.
4. Sale of part without stipulation.
5. Where seller is under covenant to pro-
duce. | 6. Leaving deeds in seller's custody.
7. Arrangement where estate in mortgage.
8. Deposit of deed, where sufficient.
9. Nature of evidence.
10. Assignments lost.
11. Lease for a year lost.
12. Recitals as evidence.
13. Evidence where deeds lost or destroyed.
14. Title without deeds. |
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| (f) Walker v. Moore, 10 B. & C. 416.
(g) Hodges v. Ld. Litchfield, 1 Bing. N.
C. 499.
(h) Poole v. Shergold, 1 Cox, 160. | (i) Ch. 17, <i>post</i> .
(k) Ch. 6, <i>supra</i> .
(l) 3 Hare, 25, which <i>qu</i> . |
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| 15. Seller to execute new conveyance if old one burnt.
16. Whether covenant to produce is within covenant for further assurance.
17. Purchaser's right to evidence after conveyance.
18. Relieved if fraud, &c.
19. Execution of title deeds not to be proved. | 20. Laythoarp v. Bryant.
21. Will to be produced though seller heir.
22. Not to be proved against heir.
23 Whether the deeds are transferred with the seisin.
24. Grant of deeds.
25. Yea v. Field. |
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1. ALTHOUGH the ancient practice as to the custody of title deeds has varied greatly in later times,(1) the principles of law regarding them are still the same. The title deeds are things which go with the inheritance; descend with it, and pass with it by conveyance without being named.(a) The person who is

(a) See *Austin v. Croome*, 1 Car. & Mar. 653. [In the United States, where deeds of conveyance of lands are universally registered, the grantor retains his own muniments of title, the grantee being ordinarily permitted to give in evidence certified copies from the registry, of all deeds under which he claims or deduces title, to which he was not himself a party, and of which he is not therefore supposed to have the control; the burden of proof being on the other party, to show some circumstances impeaching the deed, and so taking it out of the rule and requiring its production. 2 Cruise Dig. by Mr. Greenleaf, tit. 32, ch. 9, § 19, note (1); 4th vol.

p. 164; 1st vol. 75, note (1); 1 Greenl. Ev. § 571, note; *Knox v. Silloway*, 1 Fairf. 201, 216-220; *Scanlan v. Wright*, 13 Pick. 523; *Woodman v. Coolbroth*, 7 Greenl. 181; *Loomis v. Bedel*, 11 N. H. 74; *Kelsey v. Hanmer*, 18 Conn. 311; *Ford v. Peering*, 1 Ves. jr. (Sumner's ed.) 72, note (a). And where a copy is, on this ground, admissible, it has been held that the original, which has been duly registered, may be read in evidence without proof of its formal execution. *Knox v. Silloway*, 1 Fairf. 201. This practice, however, of admitting copies, has been restricted to instruments which are by law required to be registered, and to transmissions of title

(1) Whilst warranties prevailed, and before covenants were introduced, the title deeds, except where they were necessary for the defence of the feoffor, who had himself entered into a warranty, went with the estate (*Lord Buckhurst's case*, 1 Rep. 1); and this right moulded itself according to the interests of the parties; if a man enfeoffed two, and the heirs of one of them by deed, and the deed and other evidences concerning the land were delivered by the feoffor to him who had the fee, and afterwards he who had the fee died, he who survived should have the deed by which he was enfeoffed, because it makes his estate; but he should not have the ancient charters, for they were delivered to the other joint tenant for the safeguard of his inheritance, which Coke calls a notable case (1 Rep. 2 a). Again, if a man enfeoffed two, to them and their heirs, and gave the ancient charters to one of them, and he died, the survivor should have all the charters, and not his heir, to whom the gift was made, for he could sustain no loss from the want of them, nor receive any benefit by them if he had them, but *contra* of the survivor; but he should have them as things which went with the land (1 Rep. 2 b). But even under that rule, such things as were not necessary to the defence of the seller, as exemplification of records, court rolls, pedigrees, or the like, belonged to the grantee of the land, without any grant of the deeds (*Moo. 503*; 3 Ves. 226), because they were not material evidence to defend the title paramount.

entitled to the land has a right to all the title deeds affecting it; and it is immaterial that there is an outstanding term of years in a trustee. Therefore, where a seller, upon receipt of part of the purchase money for a leasehold *estate, executed an assignment as an escrow,(1) which, with the deeds, was left with the solicitor for both parties, to be delivered to the purchaser when the rest of the money was paid, it was held that the vendor could not by the aid of the solicitor pledge the deeds to a third party, although an innocent one, for more than the balance due, because the deeds belonged to the purchaser.(b) In this case the deeds had been deposited for the purchaser, who had not *completed* his purchase.

2. And although the purchaser leave the deeds without fraud, but negligently, in the hands of the seller, yet *any* subsequent purchaser from the first purchaser may, upon his legal title, recover them in trover, even against a person to whom the original seller has fraudulently conveyed the estate, as if he were still owner of it, and delivered the deeds up to him.(c) In the case

inter vivos; for if the party claims by descent from a grantee, it has been held that he must produce the deed to his ancestor, in the same manner as the ancestor himself would be obliged to do. *Kelsey v. Hamner*, 18 Conn. 311. A want of the regular registration of the deeds by which a vendor deduces title, there being no other proof of their execution, is an insuperable objection to compelling the vendee to receive a conveyance. *Bartlett v. Blanton*, 4 J. J. Marsh. 428. But registration is not necessary to pass title; as between the parties, the title passes by the deed. The purpose of registration is notoriety. *Palmer v. Paine*, 9 Gray, 56; *Dole v. Thurlow*, 12 Met. 157; *Wilkins v. May*, 3 Head (Tenn.), 173. It is said that a deed cannot be read in evidence on a trial, unless it has been registered; *Palmer v. Paine*, 9 Gray, 56; but the contrary has been held in *Keichline v. Keichline*, 54 Penn. St. 75.]

(b) *Hooper v. Ramsbottom*, 4 Ca. 121; 6 Taunt. 12; *Goode v. Burton*, 1 Ex. 189.

(c) *Harrington v. Price*, 3 B. & Ad. 170; *Wakefield v. Newton*, 6 Q. B. 276; *Bernard v. Drought*, 1 Mol. 38, which *qu.*; *Smith v. Chichester*, 2 Dru. & War. 393; *Blunden v. Desart*, *Ib.* 405; *Molesworth v. Robbins*, 2 J. & L. 358; *Pelly v. Wathern*, 7 Hare, 351; 1 De G., M. & G. 16; *Watson v. M'Lean*, 1 El., Bl. & El. 75. As to a solicitor's lien on title deeds for the costs of the suit, *Baker v. Henderson*, 4 Sim. 27; *Philips v. Robinson*, 4 Taunt. 106; see *Watson v. Lyon*, 7 De G., M. & G. 288; *Newton v. Beck*, 3 H. & N. 220. And as to his lien as a shield against production, *Hope v. Liddell*, 7 De G., M. & G. 331; *infra*. ch. 24, s. 1.

(1) If the fact of the agreement can be inferred from the circumstances, a deed may operate as an escrow only, although no express words were used at the delivery. *Gudgen v. Besset*, 6 E. & B. 986.

in which this was decided the purchase was completed, and the owner of the land stood upon his mere right to the deeds as incident to his ownership.

3. So if upon an agreement for a purchase, the seller deliver the instrument under which he holds the estate to the purchaser, in order to enable him to prepare a conveyance to himself, the latter will, upon payment of the purchase money and taking a conveyance, be entitled to retain possession of the instrument; but if the purchaser refuse to perform the contract according to its import, or to return the instrument, an action of trover will be maintainable for it.(d)

4. Upon a sale of part of an estate without any stipulation as to the deeds, the holder of the portion of the highest value is entitled to the custody of the deeds, — whether the seller or the purchaser, — giving to the other a covenant to produce them; but of course the purchaser would not be bound to furnish the seller with attested copies of them.

5. It would not, it should seem, be a sufficient reason, why a seller should retain the deeds, where he sells the property in respect of * which he retained them, that he had covenanted with a former purchaser of part of the estate for the production of them; but the seller would be entitled to have the covenant recited in the conveyance or indorsed on it, and might fairly require a covenant from the purchaser to perform it. The seller would not be at liberty after the second sale, to deliver the deeds to the first purchaser.

6. There is great inconvenience in leaving the title deeds in the hands of a seller who has parted with the whole of the property, although he has covenanted to produce them, for the obligation is soon forgotten or disregarded, and the deeds accordingly are in danger of being neglected or destroyed, unless by being sometimes called for, they produce emolument in the hands of a solicitor.

7. Where the estate is in mortgage at the time of the sale, and only part of it sold, and the mortgage is not wholly paid off, as the mortgagee cannot be compelled to covenant for the production of the deeds, and of course will not part with them, some

(d) *Parry v. Frame*, 2 Bos. & Pul. 451 *Foster v. Foster*, 1 Hog. 224, as to an opinion of counsel.

careful provision on this head should be made before the sale. If the mortgagee should agree to covenant for the production of them, he would probably limit his responsibility to the time he should continue mortgagee, which would not be satisfactory to a purchaser or binding upon him; or if the mortgagee were to enter into a general covenant to produce the deeds, he would, upon being paid off, probably object to relinquish the possession of the deeds unless he were released by the purchaser from his covenant, which would lead to expense and vexation. An arrangement might be made in such a case for the deposit of the deeds at a banker's, for example, for the benefit of the mortgagee and purchaser until the mortgage was paid off or foreclosed, and the deeds might then be delivered up to him or to the seller (as the case might require), upon his entering into a covenant to produce them to the purchaser, and this could be provided for by the conditions of sale or agreement; and it admits of no doubt that any stipulation of that nature would be binding upon the purchaser, and could not be disregarded by a court of equity.(1)

8. In a proper case, a purchaser will be compelled to be content with the deposit of a deed for the benefit of himself and others interested in it. As where the reversion of an estate was sold in lots, subject to a ground lease, which contained covenants to the benefit of which the purchasers would be entitled. Nothing was said in the particulars of sale as to the custody of the counterpart of the lease, and it was not in the possession of the sellers, but of one of the other parties to a partition. The counterpart of the lease not being in the possession of the plaintiffs, was not considered an objection * to their title. The lease was deposited, and the purchase enforced.(e) Although, in the above case, there was an equitable right to compel the production of the deed, and the deed itself was enrolled in the common pleas, yet that was not deemed satisfactory by the court.

9. There are few titles in which all the evidences of title are

(e) *Shore v. Collett*, Co. 234; *Worthington v. Morgan*, 16 Sim. 547.

(1) There appears to be no sufficient reason for the opinion of the real property commissioners, that mortgagees should be compelled to produce the title deeds, although not paid off.

within the purchaser's reach, so as to enable him to furnish them to a future purchaser, and yet he may be bound to accept the title: in many cases a purchaser is entitled to have instruments produced as *negative* evidence that the estate sold was not comprised in them, yet he would not be entitled to a copy of them, or a covenant to produce them.^(f) So portions are settled, and mortgaged, and assigned, and ultimately released, and the purchaser at the time satisfies himself of the contents of the deeds of settlement, &c., but rarely can procure a covenant to produce them all; yet a subsequent purchaser, where some time has elapsed, is seldom advised to consider the want of these deeds as an objection to the title, nor could the objection in many cases be insisted upon. There is now some authority for this statement. In *Offen v. Harman*,^(g) there was no covenant to produce three deeds which were not in the seller's possession, but the deeds were produced, and attested copies of them furnished to the purchaser; one of the deeds was an appointment of a portion to a younger child, and this portion was subsequently released by deed, and the terms created for raising it were surrendered, and there was a covenant to produce this latter deed; another of the three deeds was an assignment and transfer by way of mortgage of part of a charge on the estates, but this mortgage was subsequently released and the estates reconveyed, and there was a covenant to produce this release and reconveyance; the last of the three deeds was a grant of an annuity to a child out of other estates in substitution of the settled estates, and the charge of the annuity on the settled estate was released by the first mentioned deed of release, and, as already stated, there was a covenant to produce this deed. The three deeds were considered as collateral only to the title. In *Moulton v. Edmonds* already stated,^(h) where there was sufficient secondary evidence of the execution and contents of deeds recited, which could not be found, but part of the evidence consisted of affidavits of professional men, which set out extracts from the account books of deceased solicitors concerned in framing those deeds, making charges for preparing the deeds, and for attending to wit-

(f) *Infra*, s. 6.

(h) Ch. 11, s. 2, pl. 30, 31.

(g) 29 L. J. N. S. 307; 6 Jur. N. S. 487;
see 1 De G., F. & J. 253.

ness their execution; it was objected, that the books referred to could not be delivered to the purchaser, and it was insisted that *there was this canon in conveyancing, that, "to make out a marketable title, all the evidence must be portable, such as may be carried into the market, and shown to those who are inclined to buy." The court denied the existence of any such canon, and stated that it was at variance with the established practice of conveyancers; for pedigrees in an abstract are proved by a reference to family bibles, and surgeon's books, which are not handed over with the abstract; and identity of parcels is proved by a reference to maps, which are not in the custody of the vendor, and which he does not hand over to the purchaser, nor give any certain means to the purchaser to acquire.

10. It cannot be laid down as a general rule, that a purchaser of a leasehold estate can safely accept the title where any of the mesne assignments have been lost, although he might be able to recover in ejectment if he actually did purchase. Every case of this nature must depend upon its own circumstances.(i) A purchaser is at all events entitled to a strict inquiry as to the loss, and is not bound to rely upon an affidavit by the other party.(j)

11. The loss of a lease for a year, where it was recited in the release, which was a conveyance to a tenant to the precipe, was held, in a suit against the purchaser, to be supplied by the 14 Geo. 2; (k) and the court was of opinion, that it would not be unreasonable to presume, as the lease was recited in the release, and the parties were thus apprised of the necessity of the lease, that there was a lease.(l) The deeds were seventy years old, and it is clear that a lease ought to have been presumed. A lease for a year is no longer necessary,(m) and recitals or notices in releases of leases for a year, when necessary, are made conclusive evidence of the lease for a year, and full effect is given to the releases, whether the lease for a year shall or not have been lost or mislaid, or may or not be produced.(n)

(i) *Earl v. Baxter*, 2 Black. 1228; 11 Ves. 350; *sup.* *Skipwith v. Shirley*, 11 Ves. 64; *Ward v. Garnons*, 17 Ves. 134.

(j) *Stubbs v. Sargon*, 4 Beav. 90.

(k) Ch. 21, s. 5; *post*, ch. 22.

(l) *Holmes v. Aillsbie*, 1 Mad. 551;

(m) 4 & 5 Vict. c. 21.; 7 & 8 Vict. c. 76, s. 2; 8 & 9 Vict. c. 106, s. 2.

(n) 4 & 5 Vict. c. 21, s. 2.

12. Where an old deed recites prior deeds, and the seller is unable to procure the instruments recited, the true inquiry is, whether the absence of the deeds recited throws any reasonable doubt upon the title. Where there is a title of sufficient age without the aid of the recited deeds, and no circumstance to repel the presumptions in favor of the title, the court will compel the purchaser to accept it.(o)

13. The loss of the deeds may not be fatal to the title if the vendor can deliver over copies which would be evidence at law.(p) But if * the title deeds are lost, the seller must furnish the purchaser with the means of showing what were the contents of the deeds, and of proving that they were duly executed, and this even where the deeds are accidentally destroyed by fire after the contract is made.(q) A registered memorial may be good secondary evidence of the contents of the deed.(r)

14. A title *may* be a good one, although there are no deeds, but there must have been such a long uninterrupted possession, enjoyment, and dealing with the property, as to afford a reasonable presumption that there is an absolute title in fee simple.(s) And of course the absence of any documents in support of the title must be satisfactorily accounted for, so as to guard against the danger of settlements, mortgages, or wills having been suppressed. Where the title under a conveyance which recited other deeds was fortified by sixty years' undisputed possession, it was held that the loss of a deed recited threw no considerable doubt upon the title of the vendor, and that the purchaser was bound to complete his purchase.(t)

15. If a conveyance to a purchaser have accidentally been burned, the seller will be compelled upon a resale to join in a conveyance to the new purchaser,(u) or, of course, if the estate is not resold to again convey to the first purchaser.

(o) *Prosser v. Watts*, 6 Mad. 59; *Doe v. Brooks*, 3 Ad. & El. 513; *Gillett v. Abbott*, 7 Ad. & El. 783; *Bringloe v. Goodson*, 5 Bing. N. C. 738; *Moulton v. Edmonds*, 1 De G., F. & J. 246.

(p) *Harvey v. Phillips*, 2 Atk. 541; *Booth's opinion*, 2 Ca. & Op. 223; *Coussmaker v. Sewell*, App. No. 11, Purch.; *Const v. Barr*, 2 Mer. 57; *Brindley v. Woodhouse*, 1 C. & K. 646.

(q) *Bryant v. Rusk*, 4 Rus. 1.

(r) *Cathrow v. Eade*, 4 De G. & Sm. 527; *Sadlier v. Biggs*, 4 Clark, 435.

(s) *Cottrell v. Watkins*, 1 Beav. 361; *Parr v. Lovegrove*, 4 Drew. 170.

(t) *Prosser v. Watts*, 6 Mad. 59; *Alexander v. Crosby*, 1 J. & L. 666; *Moulton v. Edmonds*, 1 De G., F. & J. 246.

(u) *Bennett v. Ingoldsby*, Finch, 262.

16. It seems that under a covenant for further assurance a purchaser who has not obtained the title deeds or a covenant to produce them, cannot require a covenant to produce them to be executed to him.(x)

17. If a purchaser take a conveyance from an heir at law, by deeds which set forth the pedigree of the vendor, he cannot afterwards file a bill stating that there are various books which prove the pedigree as recited, and requiring them to be delivered up to him. If he was satisfied at the time when he took his conveyance, he cannot afterwards call for proof of its accuracy.(y)

18. But if there have been any fraud or misrepresentation regarding the custody of a document which relates to the title, equity will after the conveyance order it to be deposited in court for the benefit of both parties.(z)

19. A vendor, unless some special ground be laid for it, is never called upon to prove the execution of the title deeds.(1) And *even if the seller bring an action, yet the title deeds need not be proved.(a)

20. Generally speaking, on purchases,(b) an abstract is delivered, on which a correspondence or communication takes place, and the question arises on the law as it affects the title disclosed. Under such circumstances, a party having admitted the deeds to be authentic, and the legal effect of them as to title being the only matter in dispute, would not be permitted to turn round at the trial and require proof of the genuineness of the deeds themselves. Where nothing had taken place but a bare delivery of the abstract, and the seller was the assignee of a lease, he was held bound to prove the execution of the lease — the very thing sold.(2) It was *not* said that where the seller holds the lease

(x) *Fain v. Ayres*, 2 Sim. & Stu. 533;
Hallett v. Middleton, 1 Rus. 256, 257.

(a) *Thomson v. Miles*, 1 Esp. 184; but
see *Crosby v. Percy*, 1 Ca. 303.

(y) 1 Rus. 256; so as to debts, *Hallett v. Middleton*, 1 Rus. 243.

(b) *Laythorp v. Bryant*, 1 Bing. N. C. 421.

(z) *Harrison v. Coppard*, 2 Cox, 318.

(1) By 17 & 18 Vict. c. 125, s. 26, it is not necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite, and such instrument may be proved by admission, or otherwise, as if there had been no attesting witness thereto; and see s. 27, as to comparison of handwriting, and s. 24, as to cross-examination as to previous statements in writing.

(2) The case of *Nash v. Turner* (1 Esp. 217, 1 Ca. 303), does not apply to this

himself he is bound to prove *all* the *mesne* assignments, but he ought to show that the lease was a valid subsisting instrument. In the case of a freehold estate it would probably be deemed sufficient, — although there had been no previous communication on the title, — to prove the execution of the conveyance of the fee to the seller.(c)

21. Where a will has been executed it must be produced before a purchaser can be compelled to accept the title, although, having been treated as a nullity by a professional man, it has been mislaid, and the seller, being heir, has rested upon his title as heir.(d)

22. The purchaser cannot as a general rule require a will, under which the vendor claims, to be proved in equity against the heir at law, or to have the concurrence of the heir.(e) This, after some doubt, was decided by Lord Kenyon in *Bellamy v. Liversidge*,(f) although where suspicion is cast upon the will the purchaser could not be compelled to take the title without the concurrence of the * heir or the establishment of the will. In a case (g) where the will was in favor of the solicitor who drew it and his children, although the heir had failed in an action against the tenants for rent and a new trial had been refused, Lord Cottenham refused to enforce the acceptance of the title; and as the purchaser was willing to wait, the vendor, the plaintiff, was required to file a bill to establish his title against the heir. An answer to such a bill abandoning the claim would remove the objection, and if an issue were required, it would be

(c) *Nash v. Turner*, 1 Esp. 217; 1 Ca. man *v. Duchess of Rutland*, 3 Ves. 233; 303. 8 Bro. P. C. 145; *Colton v. Wilson*, 3 P.

(d) *Stevens v. Guppy*, 2 Sim. & Stu. Wms. 190; *Mackrell v. Hunt*, 2 Mad. 34; 439. *sed vide* *Smith v. Hibbard*, 2 Dick. 730.

(e) *Fearne's Posth.* 234; *Harrison v. Coppard*, 2 Cox, 318, as to the custody of the will. (g) *Grove v. Bastard*, 2 Phi. 619; 1 De G., M. & G. 12; *Boyse v. Rosborough*, or *Cuiclough*, 1 Kay, 110; *aff'd* 18 Jur. 205; 1

(f) *Chan.* 1 June, 1786, MS.; *Wake-* K. & J. 124; *Lovett v. Lovett*, 3 K. & J. 1.

question, for the action there was by a purchaser against the seller to recover a sum of money paid for fixtures, which had been sold without any title. *The seller was the original lessee*, and the plaintiff claimed under an assignment from him. The assignment was indorsed on the lease, and the assignment was proved by the subscribing witness, but not the original lease; and Lord Kenyon ruled that the proof of the assignment was sufficient. It will be observed, that the lease was the defendant's own title; *the assignment from him* to the plaintiff was duly proved.

properly tried between the heir and the devisee. Of course the seller would not have been compelled to take this step, but the court no doubt would, if he had declined to do so, have dismissed his bill. The will was established in a suit against the heir after an ejectment; (*h*) and finally Lord Truro held, that the purchaser ought to have been satisfied with the title without any further proceeding, and consequently visited the consequences of the suit to establish the will on the purchaser in both costs and interest. (*i*) Where a title was rested upon a will which had been proved, but did not pass the property, and upon a codicil republishing the will, and sufficient by the force of republication to pass the property, and the due execution of which was proved by affidavit of two of the witnesses, the title was not deemed such as could be forced on the purchaser until the codicil was submitted to probate in the ecclesiastical court. (*k*)

23. It is said that as the statute of uses only transfers the legal estate to the use, it does not interfere with the title deeds, and therefore the feoffee or grantee is entitled to the custody of them. (*l*) There is considerable authority for this statement; but there is hardly one case in which it was necessary to decide the point; (*m*) and it has been questioned by Lord Hardwicke, who said, that though so clearly established, he knew not but when it was considered it might be called a spungy reason, as Lord Vaughan said; (*n*) and it has since been doubted by Mr. Hargrave. (*o*) The authorities make no distinction between feoffees or grantees and covenantees, or, in other words, between conveyances which operate by transmutation of possession and those which do not. Now the statute not only provides that where one person stands seised to the use of another, the latter shall be deemed in the lawful seisin, estate, and possession * to all pur-

(*h*) *Grove v. Young*, 5 De G. & Sm. 38.

(*i*) *Grove v. Bastard*, 1 De G., M. & G. 69, *qu.* and consider the case; *M'Culloch v. Gregory*, 3 K. & J. 12; *Fowler v. Lightburne*, 11 Ir. Ch. Rep. 495.

(*k*) *Weddell v. Nixon*, 17 Beav. 160.

(*l*) 1 Sand. Uses, 119; *Sugd. Gilb. Uses*, 186, n.

(*m*) *Estofte v. Vaughan*, Dy. 277 a;

Sacheverel v. Bagnoll, Cro. Eliz. 856; *Huntington v. Mildmay*, Cro. Jac. 217; *Stockman v. Hampton*, Cro. Car. 441; *Reynell v. Long*, Carth. 215.

(*n*) *Whitfield v. Fausset*, 1 Ves. 394.

(*o*) *Co. Litt.* 6 a, n. 25.

poses in the like estate as the former had to the use, but proceeds to divest the estate, title, and right that was in such person, and to vest it in the *cestui que use*. This, therefore, is a legislative conveyance to the *cestui que use* as powerful as the common law conveyance to the feoffee to uses, and as the latter conveyed to him the right to the deeds, although they were not granted, so the former ought to have as powerful an operation in transmitting them with the estate from him to the *cestui que use*. The opinion that in the case of a covenant to stand seised for the consideration of blood with strangers, the deed does not belong to the relation who takes the estate, but to the covenantees, and that he has no means to obtain the deed (*p*) shows how little principle was adhered to, for in that case the deeds were held to belong, *not to the person who took the estate*, but to the persons who did not, and had not even any seisin vested in them, for in such cases the uses are served out of the covenantor's own seisin, and there is no *transfer* of the legal estate out of which the statute is to serve the uses. (*p*¹)

24. Sometimes the deeds are granted by the conveyance to the purchaser, and where uses are created, and he is not the releasee to uses, the grant is to him, his heirs and assigns, and this, adverting to the authorities, would seem to be the proper course.

25. In *Yea v. Field*, Lord Kenyon laid stress upon the circumstance that the assignee of a mortgage had not a grant of the deeds. (*q*) Part of a leasehold estate, the whole of which was held under one title, was in mortgage, and the mortgagee held the deeds. The owner sold the part not in mortgage, and gave to the purchaser a covenant from himself to produce the title deeds. The purchaser afterwards paid off the mortgage, and took a transfer of it, and obtained the delivery to him of all the deeds. He then assigned the mortgage to a third person without any actual grant of the deeds, and without delivering them over, and upon trover brought by the latter assignee against the assignor to him (the purchaser), Lord Kenyon said, that although

(*p*) *Stockman v. Hampton*, Cro. Car. 441. ered by Mr. Perry in his work on Trusts, §§ 298, 299, & notes.]

(*p*¹) [See this subject very fully considered by Mr. Perry in his work on Trusts, §§ 298, 299, & notes.]
(*q*) 2 T. R. 708; *Hobson v. Mellond*, 2 Moo. & Ro. 342.

at the time of the purchase, the defendant had no right to the possession of the deeds, yet since that time they had by accident come into his possession, and the plaintiff could not recover them from him. To entitle the plaintiff to recover, he should have a better right to the deeds than the defendant, *but in the assignment to him there was no grant of them.* In old conveyances there is a reservation made of such deeds as tend to deraign the warranty paramount. This decision can hardly be supported, for the estate was divided into two parcels, one of which was not in mortgage, and was sold with a covenant to produce the deeds, but without any right to the deeds themselves, — the other parcel remained the property *of the seller* and of his mortgagee. Now no one could acquire, by * taking a transfer of the mortgage, a greater right than the mortgagee, and he had no right to the deeds *except as mortgagee.* Under the first transfer, the purchaser of the other part obtained the legal estate in the part mortgaged, and the deeds *as mortgagee*; when, therefore, he assigned in that character, the deeds passed with the land without the necessity of any grant: the *legal* right to them went with the mortgage; but the effect of the decision in the king's bench was, that the second assignee, when he came to be paid off, would not have it in his power to deliver back the deeds to the mortgagor, to whom they belonged, and who was under covenant to produce them. It was a mistake to mix together the two characters of the defendant as purchaser of one part and mortgagee of another — they were altogether distinct; and the observation, that in the assignment to him there was no grant of the deeds, ought rather to have been applied to the assignment to the purchaser of the part sold, than to the assignment by him of the portion mortgaged. The want of a grant of the deeds to himself was proved, by the covenant to produce them, to have been omitted, because it was not intended that he should have them, and his claim therefore was not authorized in his character of a mortgagee who had assigned over, nor in his character of a purchaser who, by contract, was precluded from claiming them. In a later case,^(r) however, the court of king's bench referred to *Yea v. Field* as an authority. The *decision* was, that no stranger could in answer to an action by the owner

(r) *Davies v. Vernon*, 6 Q. B. 443.

of the equity of redemption for the deeds set up any supposed claim of the mortgagee; but there are observations in the judgment which if they can be supported, would justify conveyancers in introducing in every mortgage or conveyance an express grant of the deeds.

SECTION V.

OF THE PRODUCTION OF DEEDS IN EQUITY AND AT LAW.

- | | |
|---|---|
| <ol style="list-style-type: none"> 1. Settlement relating to property of several owners; partition. 2. Right of purchaser where he has no covenant to produce. 3. Tenants in common, &c. 4. Holder of deeds becoming mortgagee. 5. Vested remainder-man and purchaser under him. | <ol style="list-style-type: none"> 6. Contingent remainder-man. 7. } Mortgagee in fee under tenant for life, 8. } with the deeds. 9. Production of deeds in a suit, where the conveyance is impeached. 10. Production at law. 11. Mortgagee consenting to sale. |
|---|---|

1. **ALTHOUGH** the rule is not universal, and may be affected by circumstances, yet where several parties are entitled to property held under one settlement, and one has possession of it, a court of equity * will order it to be brought into court for the benefit of both parties. (a) So where an estate is divided upon a partition, and a counterpart of a lease of the whole is delivered to one of the parties, the parties entitled to the other shares would be entitled to the production of the counterpart, in order to enable them to proceed against the tenant if necessary. (b) (1)

(a) *Ld. Banbury v. Briscoe*, 2 Ch. C. 42; *Harrison v. Coppard*, 2 Cox, 318. (b) *Shore v. Collett*, Co. 234.

(1) The courts have now power in any cause, or other civil proceeding, upon affidavit, to order the production of any document, to the production of which the party is entitled, for the purpose of discovery, or otherwise, 14 & 15 Vict. c. 99, s. 6 (courts of law); 16 & 17 Vict. c. 113, s. 164 (Ireland); 15 & 16 Vict. c. 86, s. 18 (courts of equity); 17 & 18 Vict. c. 125, s. 50 (superior courts); see *Hunt v. Hewitt*, 7 Ex. 236; *Riccard v. Blamire*, 4 E. & B. 329. Application in equity is to be made to the judge in chambers, and if any difficulty arise, the discussion will be adjourned to the court. *Thompson v. Teuton*, 9 Hare Ap. 49, and the cases in the n. As to a general order for production, *Fiott v. Mullens*, 1 Sm. & Gif. 1; *M'Intosh v. Gt. Western Ry. Co. Ib.* 4. The 15 & 16 Vict. c. 76, s. 117-119, provides for the admission of documents at law, and the 16 & 17 Vict. c. 113, s. 118, provides in like manner for Ireland; and see s. 64 at to the production, &c., of deeds. A man cannot at law, any more than in equity, be compelled to produce deeds which he swears relate exclusively to his

2. Where a person sold a part of his estate with the usual covenants for title, including a covenant for further assurance, but without any covenant to produce the title deeds, all of which he retained; upon a bill filed by the purchaser, who had resold, praying alternatively either a deed of covenant to produce, or the actual production of the title deeds, to show a marketable title upon his resale, the V. C. observed, that whatever doubt there might be upon the right to a covenant to produce,—the defendant's title deeds being a sort of common property,—he strongly inclined to think that the plaintiff had an equity to the extent of the production of the deeds, and he was informed that the lord chancellor had expressed an opinion to that effect, and therefore he overruled a demurrer by the defendant to the plaintiff's bill.^(c) And this certainly, speaking from recollection, was Lord Eldon's opinion.

3. At law, where there are tenants in common, joint tenants or coparceners, whichever obtains possession of the deeds may retain them; but upon proper occasions, in proceedings by the others at law, the production of them would be compelled; and in equity, there is no doubt that in such a case the court will, upon a bill filed, order the production of the title deeds in the hands of either for the other's inspection, where he has sold his share, or upon any other occasion.^(d)

4. But if before the bill filed the person holding the deeds has * changed his character from the absolute owner to that of a mortgagee of a purchaser from him, although the deeds have never been out of his possession, the court will not compel him to produce them, for the estate is the purchaser's who made the mortgage, and a mortgagee has no right to show his mortgagor's title.^(e)

5. The legal tenant for life is entitled to the custody of the

(c) *Fain v. Ayres*, 2 Sim. & Stu. 533, Sm. & Gif. 174; *Elton v. Elton*, 6 Jur. N. sup.; *sed qu.* S. 136.

(d) *Lambert v. Rogers*, 3 Mer. 489; (e) *Lambert v. Rogers*, 3 Mer. 489; *Shore v. Collett*, 204; *Burton v. Hery v. Ferrers*, 4 Beav. 97; *Balls v. Neville*, 2 Cox, 242; *Yates v. Plumbe*, 2 Margrave, 119.

own title, and do not show any title in the claimant. *Adams v. Lloyd*, 3 H. & N. 351. [See 2 Dan. Ch. Pr. (4th Am. ed.) 1831, 1832.]

deeds,(f) but a vested remainder-man may enforce the production of the deeds from the tenant for life, unless the latter can show that it is required for an improper purpose, or that the claim to the remainder is open to litigation. A purchaser under the remainder-man would of course have the same right as the tenant for life had.(g) Even at law a person, though no party to a deed, who takes an estate by way of remainder under it, has a strong interest in the deed, and is entitled to the production of it.(h)

6. Where a remainder under a settlement was contingent, and indeed so circumstanced that it might be barred; the court refused to compel the tenant for life to produce the title deeds. And an inspection of the deeds was refused to a purchaser from the contingent remainder-man.(i)

7. If a tenant for life, who has been owner of the fee, make a mortgage, suppressing the settlement, and deliver the title deeds to the mortgagee, the mortgagee could not be compelled in equity to discover whether he had the title deeds, or to deliver them up.(k) To avoid a possible fraud in such cases, a memorandum of the settlement should be indorsed on the conveyance to the settlor, or if none, on the leading title deed remaining in his possession. Of course a purchaser from a tenant for life would stand in the same situation with a mortgagee who is a purchaser *pro tanto*.

8. And as the tenant for life cannot be compelled to give up the deeds, a first mortgagee under the remainder-man cannot be postponed because he did not obtain the deeds, in favor of a second mortgagee who did obtain them, for he was guilty of no laches; and even if he do not file a bill for the deeds, as he might do after the death of the tenant for life, yet that omission will not be sufficient to charge him.(l)

9. Even where a bill is filed to impeach the conveyance to

(f) *Garner v. Hannyngton*, 22 Beav. 627, *infra*, pl. 11, n.

(g) *Ld. Lempster v. Ld. Pomfret*, 20 Beav. 405; *Davis v. Ld. Dysart*, 20 Beav. 405; 21 Beav. 124; 3 Eq. R. 599.

(h) *Bateman v. Phillips*, 4 Taunt. 161.

(i) *Noel v. Ward*, 1 Mad. 322, 339; *Ivie v. Ivie*, 1 Atk. 429; *Joy v. Joy*, 2 Eq. Ca.

Ab. 284, probably an imperfect note of the same case.

(k) *Wallwyn v. Lea*, 9 Ves. 24, overruling *Strode v. Blackburne*, 3 Ves. 222; 3 K. & J. 638.

(l) *Tourle v. Rand*, 2 Bro. C. C. 650; *Farrow v. Rees*, 4 Beav. 18; *Finch v. Shaw*, 19 Beav. 500.

the purchaser on the ground of fraud, although the court will order the * production of the deed at the hearing,(m) yet it will not compel its production before that period, where the purchaser denies the alleged fraud,(n) unless the fraud appears on the deed itself; as for example, where from the peculiar manner in which the receipt was signed, the deed having been folded down so that the plaintiff could not see what she was going to sign, and the purchaser, though he said he was a purchaser for valuable consideration, without notice of the fraud, did not deny that he had notice of these circumstances; the court ordered the production of the assignment to the purchaser.(o) So where the fact of notice appeared from the recitals in the deed, as set forth in the answer, it was ordered to be produced before the hearing.(p) And a solicitor, who bought from his clients, who were trustees, and submitted to the purchase being set aside, was compelled to produce the deeds before the hearing, although he swore they would expose a bad title.(q)

10. The general rule at law is, that unless the party holding the deed has been in effect a trustee for the party requiring the production of it, he cannot call for it.(r) If a purchaser were to complete his purchase and leave the deeds in the hands of the seller, who retained other estates held under them, without taking any covenant to produce them, he would have no remedy at law to enforce their production. This has always been considered the rule in practice.

11. Mortgagees, generally speaking, cannot be compelled to produce the deeds until they are paid off,(s) but if they consent to be paid off by means of the purchase money to be produced

(m) *Beckford v. Wildman*, 16 Ves. 438; *Balch v. Symes*, Tur. & Rus. 87; see *Jones v. Jones*, 1 Kay Ap. 6; *Sutherland v. Sutherland*, 17 Beav. 209.

(n) *Tyler v. Drayton*, 2 Sim. & Stu. 309; 2 My. & Ke. 754, n.; *Carr v. Moulds*, 1 Hay. & Jo. 714; *Bassford v. Blakesley*, 6 Beav. 131.

(o) *Kennedy v. Green*, 6 Sim. 6; *Fencott v. Clarke*, *Ib.* 8. [See 2 Dan. Ch. Pr. (4th Am. ed.) 1830; *Apthorpe v. Comstock*, 1 Hopk. Ch. 144; S. C. 8 Cowen, 386.]

(p) *Neesom v. Clarkson*, C. Co. 93; see *Addis v. Campbell*, 1 Beav. 258; *Hunt v. Elmes*, 27 Beav. 62, setting forth the contents in the answer takes away the protection, 7 Jur. N. S. 200.

(q) *Shallcross v. Weaver*, 12 Beav. 272.

(r) *Street v. Brown*, 6 Taunt. 302; *Ratcliffe v. Bleasly*, 3 Bing. 148; *Ld. Portmore v. Goring*, 4 Bing. 152; *Cocks v. Nash*, 9 Bing. 723; consider Att. Gen. v. Prince of Wales, 11 Beav. 213.

(s) *Greenwood v. Rothwell*, 7 Beav. 291.

by sale of the property in a suit, they become bound to facilitate the sale, and therefore the deeds will be ordered into court, although they will not be delivered out without notice to the mortgagee.(t)(1)

(t) *Livesey v. Harding*, 1 Beav. 343.

(1) As regards persons claiming several interests in the same estate, the tenant for life is entitled to the custody of the deeds; and if they have been taken into the court of chancery for a purpose which is satisfied, they will be delivered out to him (*Webb v. Webb*, 1 Eden, 8; *Strode v. Blackburne*, 3 Ves. 225, 226; *Duncombe v. Mayer*, 8 Ves. 320; *Churchill v. Small*, *ib.* 32, n.; *Bowles v. Stewart*, 1 Sch. & Lef. 222; *Banbury v. Briscoe*, 2 Ch. C. 42; *Doe v. Samples*, 8 Ad. & El. 151); although, if the grantor deliver the deeds to the remainder-man, the tenant for life could not recover them (2 Bro. Ab. 84 b, pl. 25), for of course the absolute owner of land may sell or give away the title deeds as mere parchments, or destroy them at his pleasure (1 Bro. Ab. 327 b, pl. 86; Co. Lit. 232 a; *Kelsack v. Nicholson*, Cro. Eliz. 496). And it is laid down in early times, that if there be tenant for life, the remainder over by deed, whichever of them first obtains the deed shall retain it; and that, therefore, whoever has any land comprised in the deed, where others have the rest of the land, yet he who has a portion may, in respect of it, retain the deed (4 H. 7, 10; 1 Bro. Ab. 138 b, pl. 53; see 2 Dick, 650, 651). Where the tenant for life has parted with the deeds to persons not entitled to the land, and does not care about the title, equity will secure the title deeds for the remainder-man (*Ford v. Peering*, 1 Ves. jr. 72); or, if proper, they would be secured where the right to the remainder is in dispute, and a bill is filed to have it declared (*Southby v. Stonehouse*, 2 Ves. 610; *Papillon v. Voice*, 2 P. Wms. 470). So, in cases of spoliation, and in the case of a jointress, the deeds may be obtained by the remainder-man upon confirming her jointure (see 2 Ves. 450; 2 Bro. C. C. 652; 1 Ves. jr. 76). And there are dicta that every remainder-man has a right in equity to have the deeds brought into court (*Reeves v. Reeves*, 9 Mod. 132; 3 Atk. 431; *Smith v. Cooke*, 1 Atk. 382). But nevertheless, there is not a single decision that way, but the rule is settled the other. Lord Kenyon laid it down, that a remainder-man had not any action at law, or any equity, to take the deeds out of the hands of the tenant for life (*Knott v. Wise*, 8 Ves. 323). And in cases between father and son, where the former is tenant for life, and the latter tenant in tail, whether the settlement was made by the grandfather (*Pyncent v. Pyncent*, 3 Atk. 571), or by the father (*Ld. Lempster v. Ld. Pomfret*, Amb. 154, the court will not without a special case order a production of the deeds; for between father and son, the court has always suffered the settlement to remain with the father for the benefit of the family, unless he has threatened or intended to destroy it (see 2 Dick, 239). In the case of *Warren v. Rudall*, 1 J. & H. 1, Wood V. C. said that the court never interferes as to the possession of deeds between a father, tenant for life and a son entitled in remainder, but in the case of a stranger, tenant for life, the court will interfere, and where the deeds are in court, will not deliver them out to the tenant for life — *qu.* and consider this distinction. In regard to general relief in equity for deeds, an ejectment bill, as it is termed, cannot be maintained, although the claimant has not the title deeds; but if he recovers the estate at law, then equity will give him the title deeds (*Crow v. Tyrrell*, 3 Mad. 179; *Jones v. Jones*, 3 Mer. 161). In suits in equity, the court, as between the parties to the suit, does not order the production of deeds but on a very strong case of unanswerable equity. The owner of the documents never can be called on to give any

* SECTION VI.

OF ATTESTED COPIES AND COVENANTS TO PRODUCE DEEDS.

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| <ol style="list-style-type: none"> 1. Purchaser entitled to attested copies. — Unless on record. — And of them if in seller's custody. 2. Covenant to produce copies of court roll. — <i>Cooper v. Emery</i>. 3. Or bargain and sale enrolled. 4. Right to attested copies not excluded by agreement to produce deeds. 5. Purchaser entitled to covenant to produce. 6. Who is to covenant. 7. When purchaser is to pay the expense. 8. Purchaser of largest lot. 9. Covenant by assignees of bankrupt. 10. Negative evidence. | <ol style="list-style-type: none"> 11. Equitable right to production, insufficient. 12. Seller having only a covenant to produce. 13. Proviso to determine covenant. 14. Covenant, how framed as to copies. 15. What deeds it should comprise. 16. Whether a covenant to produce can be enforced under covenant for further assurance. 17. By whom to be entered into. — The covenant runs with the land purchased. — Whether with the land retained. — Rule in equity. |
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1. IF a purchaser cannot obtain the title deeds, he is, as we have already seen, entitled to attested copies of them at the ex-

reason why he should not produce them. It is a doctrine of the greatest moment to titles, that a party should not be compellable to produce his securities (*Vansittart v. Barber*, 9 Pri. 641). The general rule is that the plaintiff is entitled to the production of a deed which sustains his title, but he has no right to the production of a deed which is not connected with the title, and which gives title to the defendant (*Sampson v. Swettenham*, 5 Mad. 16; 2 My. & Ke. 754, n.; *Wilson v. Forster*, Yo. 280. [See 2 Dan. Ch. Pr. (4th Am. ed.) 1831, 1832; 2 Story. Eq. Jur. § 1490;] see *Hardman v. Ellames*, 2 My. & Ke. 745, *contra*, where referred to by the answer when produced; or the contents are professed to be stated, *Hunt v. Elmes*, 27 Beav. 62; but see *Wigram Disc.* 114; *Farrer v. Hutchinson*, 3 Yo. & Col. 692; *Smith v. Duke of Beaufort*, 1 Hare, 507; *Llewellyn v. Badeley*, *Ib.* 527; *Bennett v. Glossop*, 3 Hare, 578; *Glover v. Hall*, 2 Phil. 484; *M'Intosh v. Great Western Ry. Co.* 1 Mac. & G. 73), as where it shows constructive notice (see 2 Hare, 166, n.). But although it is alleged that the plaintiff's interest under a settlement is wholly defeated under a power in it, yet he will be entitled to have the settlement produced. *Bugden v. Tylee*, 21 Beav. 545. An heir in tail may obtain the production of the deeds creating the entail, but nothing further (*Ld. Shaftesbury v. Arrowsmith*, 4 Ves. 66; *Codrington v. Codrington*, 3 Sim. 522; *Att. Gen. v. Ellison*, 4 Sim. 240; *Herey v. Ferrers*, 4 Beav. 97; *Rumbold v. Forteach*, 3 K. & J. 748; *Howard v. Robinson*, 4 Drew. 522). And a positive denial of the plaintiff's title, and that the documents in the defendant's possession would not show his title, will prevent the court from ordering the production of the documents (*Bannatyne v. Leader*, 10 Sim. 230). As to the weight due to the statement in the bill, see *Gresley v. Mousley*, 2 K. & J. 288. If one part of a deed has been executed for both parties, or a deed has been deposited in the hands of the holder as a trustee for others only, or for others jointly with himself, its production may be compelled (1 B. & C. 263). But generally, parties are not compelled to produce their title deeds at law. If

pense of the * vendor, unless there be an express stipulation to the contrary; (a) and although he may not be entitled to the possession of the deeds, yet he has a right to inspect them, and the vendor must produce them for that purpose.(b) But a purchaser is not entitled to attested copies of instruments on record. This was decided in the case of *Campbell v. Campbell*,(c) where the master, in taxing costs incurred by the sale of considerable estates, disallowed the charges for attested copies of deeds and documents upon record; and upon exceptions to his report on that account coming on, the master of the rolls overruled them, and held that a purchaser was not entitled to such copies at the expense of the vendor. The rule must have proceeded, it should seem, upon this ground, that the purchaser having had the inspection of the originals, and procured a covenant to produce them, * was not entitled to an attested copy, because, being upon record, he could always inspect the record in the absence of the original, for attested copies are given rather for general use than as muniments of title, which they are not. There is a great distinction between a deed properly on record, as a bargain and sale, which derives its operation from the enactment, and is therefore evidence without further proof, and a deed enrolled only for safe custody, which is evidence without further proof only against the party who sealed it, and all persons claiming under him.(d) But the question between the seller and purchaser is not how the original, when it is produced, can be proved, but whether the latter shall have *any* evidence of the contents in his own possession: it is no reason why a purchaser who has not the custody of the original, should not have an attested copy of it, that the original when produced can be

(a) *Dare v. Tucker*, 6 Ves. 460; *Berry v. Young*, 2 Esp. 640, n.

(b) S. C.

(c) *Rolls*, 1793, MS.; *Cooper v. Emery*, 10 Sim. 609; 1 Phil. 38.

(d) *Ly. Holcroft v. Smith*, 2 Free. 259; see Phil. Evid.

a subpoena *duces tecum* is served, the party must take his deeds into court in obedience to the subpoena, but if he states that they are his title deeds, no judge will ever compel him to produce them (*Pickering v. Noyes*, 1 B. & C. 262; *Miles v. Dawson*, 1 Esp. 405; *Harris v. Hill*, 3 Star. 140; *Nixon v. Mayoh*, 1 Moo. & Rob. 76); nor can a man's attorney be compelled to produce a muniment of title which his client might withhold, and the judge has no more privilege to examine the document than any one else (*Doe v. James*, 2 Moo. & Rob. 47).

proved with less ceremony or difficulty than in a common case: the original in either case is out of his immediate reach, and an attested copy for ordinary purposes supplies its place.^(d) The true distinction must be between what is in private custody, and what is of public access; it was thought that if a purchaser could at all moments have access to a copy in a public office, he would not be entitled to an attested copy. The rule, therefore, seems to extend to instruments not strictly of record, as deeds enrolled for safe custody in a court of record, or wills registered and accessible, which latter, although not in a court of record, yet in common parlance are treated as on record.^(e) But if a vendor has not the instrument itself, and cannot obtain it, and can make a title without producing the deed itself, he is bound to procure an office or attested copy of it, to enable the purchaser to ascertain that the abstract is correct; and when it is obtained, the purchaser is of course entitled to it on the completion of the purchase: unless, indeed, the vendor retains other estates holden under the same title.

2. Where the estate is copyhold, and the purchaser is not entitled to the custody of the copies of court roll, he is entitled to a covenant to produce them, if the vendor has them, or if they are in his power; but if not, the purchaser cannot require such a covenant.^(f) The case of *Cooper v. Emery*,^(g) has led to some embarrassment as to copies of court roll and covenants to produce them. The evidence produced on both sides in *Whitbread v. Jordan* ^(h) did not in truth clash: the one stated the practice to be to require from vendors of copyholds the production of stamped copies of court roll, the other stated that the court rolls were the sole evidence of the title to copyholds,* and that the loss of the copies did not affect the title, and could be supplied by new copies. Both of these statements are correct. It does not appear whether any copies of court roll were produced for examination with the abstract in *Cooper v. Emery*. The question there was, whether the purchaser was entitled to a *covenant* for production of certain copies of court roll and of

(d) [See *ante*, 431, note (a).]

(f) *Cooper v. Emery*, 1 Phil. 388; 10

(e) See now 20 & 21 Vict. c. 77, s. 62, Sim. 609.
64, and s. 91.

(g) 10 Sim. 609.

(h) 1 Yo. & Col. 317.

certain deeds. The property to which they related on this sale was only 2 R. 9 P., part of an estate, and therefore it is not probable that the seller had the custody of any of the copies or deeds. The land was freehold, and the freehold title was shown by one abstract from 1736 to 1787, when Horton acquired the *manor* by purchase in fee; the title to the copyhold was shown by another abstract from 1736 to 1799, when Horton conveyed the freehold to Greaves, the copyholder in fee, and Cooper the seller derived as a sub-purchaser under Greaves. The master was of opinion that the purchaser was only entitled to a covenant to produce the conveyance of the freehold in 1799, which constituted a forty years' title; the V. C. Shadwell said the general rule was to have from the vendor or other holder of the deeds a covenant to produce them, and as the vendor had thought it necessary in order to make out his title to abstract all the documents and deeds, he was of opinion that the purchaser was entitled to a covenant for their production. Lord Lyndhurst held, on appeal, *(i)* that as to the purchaser being entitled to a covenant for the production of copies of the court rolls, *if the vendors had these copies or if they were in his power* he was bound to produce them, but *if not*, he thought the purchaser was not entitled to call for a covenant to produce them; because he might resort to the rolls themselves. He did not think that a purchaser was entitled to a covenant of an instrument merely because it was contained in the abstract. The result was that the purchaser was entitled to a covenant for the production of all the documents contained in the abstract which were necessary to make out a good sixty years' title, except such as being copies of court rolls, or bargains and sales enrolled within the statute of Anne, were not in the possession of power of the vendor. This appears to be quite right, but it does not touch the question as to the production of copies of court roll for the verification of the abstract. Before the decision in *Cooper v. Emery* the writer thus stated the rule: *(k)* where the estate is copyhold, and the purchaser is not entitled to the custody of the copies of court roll, he is entitled to a covenant to produce them, and it has been usual to require attested copies of them; and this may be supported, notwithstanding the case of *Campbell v. Campbell*, not merely because they are not strictly

(i) 1 Phil. 388.*(k)* Purch. 10th ed. vol 2, 120; 4 Yo. & Col. 564, 565.

records, but that although the court rolls are of a public nature, yet they are in a private custody, and although the inspection of them by a copyholder may be enforced, yet it may be necessary to resort to the court of king's bench for *that purpose. This statement was omitted in a later edition, but it was afterwards restored, as it did not seem to clash with anything decided in that case, and it was the practice before that case. The practice, however, is not to require attested copies of the court rolls.

3. So a bargain and sale enrolled under the statute 10 Anne, c. 18, falls within the same principle as copies of court roll.^(l)

4. In a case before Lord Rosslyn, where there was an agreement that the vendor should produce the original title deeds, he construed it not only as an engagement to produce the title deeds, but as a negative stipulation that he should not give attested copies. This was certainly presuming a great deal. Lord Eldon thought that the pressure of the stamp duties led to that decision; ^(m) and it is probable that a similar case would now receive a different determination. In a case before Lord Eldon, he compelled the vendor, at his own expense, to furnish attested copies, the purchaser having had no intimation that he could not have the deeds. For, he said, if he had notice that he was not to have them, he would regulate his bidding accordingly; conceiving that he was to bear the expense of procuring copies.⁽ⁿ⁾ From this, it may be inferred, that notice that the purchaser cannot have the deeds is tantamount to a stipulation that he shall not be furnished with attested copies at the seller's expense. The general practice of the profession, founded on the decided cases, is that the seller, in the absence of an express stipulation to the contrary, is bound, at his own expense, to furnish the purchaser with attested copies; and Lord Eldon does not appear to have intended to establish a new rule.

5. Attested copies are mere waste paper against strangers, and cannot be used upon an ejectment, unless, perhaps, as between the parties themselves.^(o) Therefore a purchaser is also entitled, at the expense of the vendor, to a covenant to produce the deeds themselves, at the expense of the purchaser; ^(p) which

^(l) *Cooper v. Emery, ubi sup.*

^(m) See 6 Ves. 460.

⁽ⁿ⁾ *Boughton v. Jewell*, 15 Ves. 176.

^(o) See *Doe v. Brydges*, 7 Sco. N. R. 339.

^(p) *Berry v. Young*, 2 Esp. 640, n.

should, in most cases, be carried into effect by a separate deed. And where a vendor retains the deed by which the estate he is selling was conveyed to him (which is mostly the case when it relates to other estates), it seems advisable for the purchaser to require a memorandum of his purchase to be indorsed on such deed.

6. Where an agreement stipulated that the purchasers who were to have the deeds which related to other estates retained by the seller, should enter into *or procure to be entered into proper and sufficient* covenants with the vendors, or such other persons as they might direct, for the production and delivery of copies of the deeds; the estate was bought by trustees, and was conveyed to them as releasees to the uses to which the purchased estates were to be liable; the *tenant for life offered to enter into the covenant, and it was held that the vendors were not entitled to a covenant from the trustees.(q) But a stipulation that the vendor shall retain the deeds, and enter into a covenant for their production, and for giving attested copies at the expense of the purchaser, precludes him from requiring such copies on completing the purchase, at the seller's expense.(r) And a stipulation that attested copies should be procured at the expense of the purchaser, which seemed to be confined to the verification of the abstract, may of course upon the context be held to exclude altogether the purchaser's demand of such copies at the seller's expense.(s) A condition that all attested or other copies, abstracts, or extracts, &c., should, whether required for the verification of the abstract or delivery to the purchaser, or for any other purpose, be provided at the expense of the purchaser, large as were the terms of it, was held not to apply to a purchase of a smaller lot than another, which latter gave to the purchaser the right to the custody of the deeds which related to the title to both lots.(t)

7. Where, upon a sale in lots by the court, a condition provided that such of the title deeds in the vendor's possession as might relate to two or more lots, should upon the completion of

(q) *Onslow v. Ld. Londesborough*, 10 Hare, 67.

(r) *Cotton v. Scudamore*, 1 K. & J. 321.

(s) *Abbott v. Darnell*, 2 Jur. N. S. 631.

(t) *Peterson v. Elwes*, 31 L. T. 341; *supra*, p. 34, pl. 60.

the sale of all such lots be delivered to the purchaser of the lot or lots largest in value, he entering into the usual covenants with the purchasers of the others of such lots for the production and giving copies thereof, and the same should, until the completion of the sale of such lots, remain in the possession of the vendors, who would allow any purchaser or purchasers interested therein to inspect and take copies of the same; and by another condition provision was made for the concurrence of all parties at the costs of the purchaser. The conditions were wholly silent as to the expense of the covenants to produce, but the court held that the expense must be borne by the purchasers with whom the covenants were entered into, for the conditions informed the purchasers that they could not have some of the deeds, and that as to other deeds those who would have them must execute deeds of covenant for their production, and the expense ought not to be thrown on the estate. It seems to have been considered that the general rules on this head do not apply to sales by the court.^(u)

8. Where the conditions are silent on the subject, and the same deeds relate to the title to several lots, the purchaser of the largest lot in value is entitled to the custody of them, and must enter into * a covenant for their production to the other purchaser, who will be entitled to attested copies of them at the expense of the vendor.^(v)

9. Where the title deeds cannot be delivered, assignees must, like any other vendor, give attested copies of them at the expense of the estate, but their covenant for the production of the deeds should be confined to the time of their continuance as assignees.^(x) The assignees' covenant should be made determinable in case they shall procure the person to whom they shall deliver the deeds to enter into a similar covenant with the purchaser.

10. Where negative evidence is necessary for the satisfaction of a purchaser, and *is in the custody of the seller*, there seems to be no sufficient reason why it should not be covenanted to be produced, although it is said that in a case where an unproved

(u) *Strong v. Strong*, 4 Jur. N. S. 943; consider the case.

(v) *Peterson v. Elwes*, *ubi sup.*

(x) Per Ld. Eldon, *Ex parte Stuart*, 2 Rose, 215.

original will not sixty years old was called for, to show that the estate was not devised away from the heir, through whom the title was derived, the V. C. held that the purchaser was entitled to inspect the will, but could not insist upon a covenant for its production, for it was merely negative evidence: (y) the seller was probably able to produce it, but it was not in his custody or power.

11. A purchaser is not bound to rely upon an equitable right to compel the production of the deeds, but is entitled to the deeds, or a valid covenant to produce them.(z)

12. Where a person having a covenant for production of the title deeds to his estate, sells only part of it, and retains his deeds, the vendor should enter into the usual covenant for production of the deeds in his possession, including the covenant to produce.

13. A seller cannot, it seems, insist upon having a proviso inserted in a deed of covenant to produce deeds for determining the covenant, in case the vendor sell the part of the estate retained by him, and procure the person to whom the estate is sold, and the deeds are delivered, to enter into a similar covenant with the first purchaser; if he could, it might on the same ground be carried on *toties quoties* and the purchaser be put to great inconvenience; neither could a purchaser insist upon it against the will of the seller. Where such a proviso is inserted, of course it stipulates that the expense of the new deed shall be borne by the seller.

14. The covenant should authorize the purchaser to *take* copies or extracts from them, unless the price to be paid for the copies be limited to the mere cost, which is the better plan.

15. A purchaser cannot, as we have seen, merely because an instrument is stated in the abstract of title, require a covenant to * produce it. He is entitled to a covenant for the production of all the documents contained in the abstract which are necessary to make out a good sixty years' title, with the exceptions before referred to.(a)

(y) *Cooper v. Emery*, 1 Hay. Conv. 573, quoted (1836). This, I suppose, is the case reported in 10 Sim. 609 (1840), on other questions as to covenants to produce. 449.

(z) *Barclay v. Raine*, 1 Sim. & Stu.

(a) *Cooper v. Emery*, 1 Phil. 388.

16. We have elsewhere considered whether a covenant to produce deeds can be enforced under a covenant for further assurance.(b)

17. Where it is intended that the purchaser shall have the legal right to the production of the deeds, he should have a regular deed of covenant for their production, entered into by the person in whose custody they are, clothed with the legal right. This covenant will run with the purchased lands, but it is a question whether it runs with lands reserved by the seller so as to bind the alienee of them.(c) The deeds are a vital portion of the inheritance, which the owner may bind by a covenant, and therefore it would seem to be the better opinion, that the covenant does run with the land in both directions, so as to bind at law the holders of the one estate, and to benefit at law the holders of the other. It must not be supposed that a title would not be marketable without a covenant running with the land to produce all the deeds. Even where it does not run with the land, it will, in equity, give to the purchaser a right to enforce the production of the deeds against persons claiming and holding them through the seller.(d) Nor could a purchaser buying only a portion of the estates held under the modern deeds, maintain that he is not bound by a covenant entered into by the seller upon a previous sale to another, to produce the deeds, because he had not notice of it; the contents of the deeds afford notice that they relate as well to other property as to his, and the course of practice leads to the inference that if the seller has parted with a portion of the estate and still has the deeds, he has covenanted to produce them, and the second purchaser is bound to inquire. And if a man sell part of his estate and deliver the deeds to the purchaser, and take from him a proper covenant for their production, the case upon a sale of another part by him, is just the same as a sale by a purchaser with a covenant to produce the deeds, and no doubt in each case he can make a title.(e)(1)

(b) *Inf.* c. 15.

(d) 2 Sim. & Stu. 533.

(c) *Onslow v. Lord Lonsborough*, 10 Hare, 67.

(e) See *Barclay v. Raine*, 1 Sim. & Stu. 449.

(1) The real property commissioners, in their third report, p. 56, observe that in a recent case (*Barclay v. Raine*, 1 Sim. & Stu. 449), where the vendor had not the cus-

tody of the original deeds, but had a covenant for the production of them, it was decided that the title was not marketable, because the covenant did not run with the land. They add, that it had previously been supposed, either that an original independent equity existed, entitling any party interested in a deed to call for its production by any other person having the custody of it; or at least, that such an equity existed wherever the parties requiring the production claimed under a person who had taken the precaution to procure a covenant for that purpose; and the person having the actual custody of it derived that custody from or through a person who had entered into such a covenant. In practice it was not considered that a court of equity would regard the subtle distinctions which prevail in courts of law, between covenants which do and those which do not run with the land, and they point out the evil consequences of this decision. The rule in equity, it is apprehended, never was so universal as it is quoted in the first part of the above statement; but the second branch, stating what *at least* the doctrine was, appears to be correct, and it is apprehended that it is not shaken by the decision in *Barclay v. Raine*. That case, which was decided by Sir John Leach, who also decided *Fain v. Ayers*, introduced no new rule as to either the law or equity upon this subject. A. sold part of his estate to Thring, and delivered the title deeds to him, and took from him a covenant to produce them; he then sold the residue of the estate to Barclay, to whom he gave an attested copy of the covenant to produce, but not any covenant to produce the deed. The deed of covenant was lost, and the attested copy was in a very mutilated state. Barclay's sons sold to Raine, and they could not make a title, because there was no covenant to produce; the deed was lost and there was no sufficient evidence of its contents. The Barclays, in order to obviate the objection, applied to Thring, who had sold his property, but was mortgagee of it, and in possession of the deeds; and although the person claiming under the purchaser from him, refused to give a general covenant to produce the deeds, yet he executed a deed by which he covenanted to produce the deeds whilst he should continue mortgagee; and he executed another deed, by which he acknowledged the execution of the original deed of covenant, and that the title deeds were at that time in his possession. The V. C. dismissed a bill filed by Barclay's sons for a specific performance with costs. He said, that a court of equity never compels a purchaser to take without the title deeds, unless he has a covenant to produce them, and a right in equity to compel the production of the deeds, even if it existed, would be no answer. *But the equity of the purchaser in the present case would be highly questionable. Thring's covenant to produce did not run with the land, nor was it pretended that the purchaser from him had notice of that covenant, and he, like every other proprietor, had a material interest against the exposure of his title deeds.* Now, first, as to the equity of the purchaser, the same learned judge in the case of *Fain v. Ayers* (2 Sim. & Stu. 533, c. 15, *inf.*) decided that the purchaser would have had a clear equity to compel the production of the deeds. In that case, which was subsequent to the case of *Barclay v. Raine*, he expressed a strong inclination of opinion, upon which he acted, that the purchaser of a part of a large estate, who never had a covenant to produce the title deeds, had a right, upon his reselling, to compel the first seller to produce them, to show a marketable title, as the first seller's title deeds were the root of the first purchaser's title, and in that sense a sort of common property; and he stated that he was informed that Lord Eldon had expressed an opinion to that effect; and in another important case, neither he nor Lord Eldon considered it material to the binding nature of a covenant in equity, that it should run with the land at law.

As to the law, no doubt the expression in the report is, that Thring's covenant to produce did not run with the land; but it appears that Sir John Leach afterwards

denied having used the expression there imputed to him. He did not say that Thring's *first* covenant did not run with the land, for he thought that it clearly did, but that the second covenant was restricted to the period of his being mortgagee (Rolls, 28 July, 1830; 7 Jarm. Convey. 375, n.); of course this must mean that it ran with the land sold to Thring, for it was not disputed that it did so with the other lands in the hands of the original seller and those claiming under him. In that respect it was the common case, for the Barclays claimed through their father, from A. the original seller, with whom Thring entered into the covenant. But the observation is not very distinct, for *both* of Thring's covenants ran with the land, and the real objection was, that the first was lost, and the second was limited to the period of his being mortgagee. The explanation, however, relieves the doctrine from the supposed authority of the case itself. Indeed, the title, it may be thought, ought to have been deemed a good one. But the deed of covenant itself had not been delivered over to the second purchaser (Barclay), nor had he a covenant to produce it, and the copy was mutilated; this would have been an objection, if the deed had been in existence, because the last purchaser was entitled to the custody of it, or to a covenant to produce it from the person holding it, but he was not entitled to have a covenant entered into with himself to produce the title deeds; if such were the law, few titles would be good. But as the deed was lost, and there was sufficient evidence of its having existed to support Thring's acknowledgment, and as he had the legal fee vested in him with the custody of the deeds, although only as mortgagee, his deed would bind the mortgagors at law when he reconveyed to them, and the equity, as we have already seen, was clear; so that perhaps, upon the whole, there should have been a decree for a specific performance, instead of the bill being dismissed with costs. It would seem also, that there was sufficient equity to have compelled the persons claiming the deeds under Thring (the mortgagor) to enter into a new covenant to produce the deeds to supply the place of the one that was lost. It was distinguishable from the case before referred to, where no covenant to produce deeds had ever been executed. But still the question remains whether a covenant to produce deeds, where the covenantor retains a part of the estate comprised in them, runs with that portion in the hands of himself and those claiming under him. For the general principles and authorities bearing upon this question, we must refer to the general discussion in a subsequent chapter; but I may here also observe, that the title deeds, as things which go with the land, — descend with it, pass with it by conveyance without being named, — may properly be deemed so connected with the land itself, as to make a covenant by the owner of the land retaining the deeds bind the alienee of those lands. This is warranted by principle, and is denied by no authority. It cannot be considered as a covenant entered into by a stranger, because the connection of the two estates under a common title, relieves the case from that difficulty. The title deeds comprise both the estates, and the proprietors of them have a common interest in the deeds; the possession of the deeds can hardly be a joint one, and therefore they are delivered to one, subject to a liability to be produced to the other. They will descend and go over with the lands with which they are thus held as an incident to them, and the subsequent acquirers of the lands will take the deeds by force of the law operating on the contract by which they are to retain them. But taking them with the lands by that contract, they must hold them subject to the burden imposed by that contract. Why then should not the covenant run with the lands in their hands? The deeds, the subject of the covenant, go with those lands as a benefit, and why should not the covenant run with them as a burden? The covenant would not run with the lands in the hands of the person to whom the deeds are to be produced were it not for the quality of the deeds, a part as it were of

the inheritance. They pass as things attendant upon the inheritance, and in truth they are the sinews of the inheritance (Lifford's case, 11 Rep. 50 b) ; they are not chattels, but an inheritance as the land is, and of the nature of the land, and go to the heir (1 Bro. Ab. 138 b, pl. 53), as incident to it (Strode v. Blackburn, 3 Ves. 225), and the owner may make the deeds appendant to a manor (1 Bro. Ab. *ubi sup.*). Without this quality, the covenant would be one merely in gross. If then this quality makes the covenant by law run with the land, whose possessor is to have only the production of the deeds, and not the custody of them, surely the actual possession of the deeds ought to impress the covenant, as against the covenantor and those claiming under him the lands retained, with the character of a real covenant, so that it may run with those lands. The deeds are a vital portion of the inheritance, which the owner may bind by a covenant, and therefore it would seem to be the better opinion that the covenant in question runs with the land in both directions, so as to bind at law the holders of the one estate, and to benefit at law the holders of the other.

* CHAPTER XII.

OF THE NEW LAWS OF REAL PROPERTY, AS CONNECTED WITH TITLE.

SECTION I.

OF TITLE WITH REFERENCE TO DOWER, DESCENT, AND WILLS.

I. Of Dower.

1. Dower of trustee's wife.
2. Dower of equitable estates.
3. Eviction of dower lands not now material to purchaser.
4. Exceptions out of new dower act.
5. New right of dower. — Husband's power over dower by disposition.
6. Gifts by will a bar of dower.
7. Covenants binding in equity. — Purchaser's inquiry.

II. Of Descent.

8. Descent to be traced from the purchaser. — Actual seisin unnecessary.
9. Descent to be proved to exclude title as purchaser.
10. Son of illegitimate father.
11. Heir, though devisee, to take by descent: grantor or his heirs also.
12. Descent from brother or sister. — Lineal ancestors heirs to issue. — Male line before the female. — Preference of mother of more remote male ancestor.

13. Half blood admitted. — Attainder not an impediment.
14. Limits of act.
15. *Possessio fratris* abolished.
16. Examination of pedigree.
17. *Badham v. Shiel*.
18. Children born abroad of a mother, natural born subject. — Wife of natural born subject, &c., naturalized.

III. As to Wills.

19. What may be disposed of by will. — Will to speak, when. — Lapsed devises fall into residue. — Copyhold and leasehold pass with freehold under general devise. — So estates subject to general powers. — Fee passes without words of limitation. — Die without issue, &c. — Estates tail, &c., not to lapse.
20. Infants' wills. — Execution of wills. — Revocation and revival of wills.
21. Wills of personalty of British subjects abroad.

THE alterations in the law effected by the real property acts now form the subject of a separate essay by the writer; he will therefore here refer only to such points as bear more immediately upon purchases or upon titles.

* I. As to Dower.(a)

1. The wife of a trustee in fee, or of a mortgagee in fee of a forfeited mortgage, is at law entitled to dower; but a fine was on that account never required by a purchaser; because, if the wife of a trustee or a mortgagee were to be so ill advised as to prosecute her * legal claim, equity would, at this day, undoubtedly saddle her with all the costs.(b) The new act does not alter the law in this respect.

2. But now dower attaches in equity on equitable estates, *e. g.* on an estate contracted for,(b¹) and whether the estate be wholly equitable or partly legal and partly equitable, where the interest is equal to an * estate of inheritance in possession;(c) and an equitable fee will be liable to dower, although subject to an executory devise over in case of no issue living at the devisee's death, which takes effect.(d) It should be kept in view that,

(a) 3 & 4 W. 4, c. 105; Sugd. on Stat. (2d ed.) 244. [Homestead rights in real estate are now common in the United States, and seriously affect conveyances.]

(b) Noel v. Jevon, Bevant v. Pope, 2 Free. 43, 71; Lloyd v. Lloyd, 4 Dru. & War. 354. [See 1 Cruise Dig. by Mr. Greenleaf, tit. 6, Dower, ch. 1, § 25, in note; 4 Kent (11th ed.), 42, 47. It is now held that the wife of a trustee is not dowerable in equity of the trust estate; Robison v. Codman, 1 Sumner, 129; Powell v. Monson & B. Manuf. Co. 3 Mason, 347, 364, 365; Cooper v. Whitney, 3 Hill, 101; Thompson v. Murray, 2 Hill Ch. 213; 4 Kent (11th ed.), 43; Derush v. Brown, 8 Ham. 412; Green v. Green, 1 Ham. 249; Bartlett v. Gouge, 5 B. Mon. 152; Cowman v. Hall, 3 Gill & J. 398; Dean v. Mitchell, 4 J. J. Marsh. 451; Gomez v. Tradesmen's Bank, 4 Sandf. 102. If, however, the equitable and legal estate meet in the same man, his wife will be entitled to dower; Hopkinson v. Dumas, 42 N. H. 303; and so, to any extent, there may happen to be a beneficial interest in him as trustee. 4 Kent (11th ed.), 43, 46; Prescott v. Walker, 16 N. H. 343.]

(b¹) [See Brewer v. Vanarsdale, 6 Dana,

204; 4 Kent (11th ed.), 50; Greene v. Greene, 1 Ham. 538.]

(c) S. 2; Lyster v. Mahony, 1 Dru. & War. 236. [See Davenport v. Farrar, 1 Scam. 314; Lewis v. James, 8 Humph. 298. In the United States the wife is generally held dowerable of an equity of redemption. 4 Kent (11th ed.), 44; 1 Cruise Dig. tit. 6, Dower, ch. 2, § 10, in note; Gibson v. Crehore, 5 Pick. 146; Walker v. Griswold, 6 Pick. 416; Fisk v. Fisk, 1 Conn. 559; Southerin v. Mendum, 5 N. H. 431, 432; Smith v. Eustis, 7 Greenl. 41; Carll v. Butman, 7 Greenl. 102; Cass v. Martin, 6 N. H. 25; Van Vronker v. Eastman, 7 Met. 157; Lund v. Woods, 11 Met. 566; Hartshorne v. Hartshorne, 1 Green Ch. 349.] As to rights of entry, see s. 3. [In Massachusetts and Maine a widow is not dowerable of wild lands. See 1 Cruise Dig. by Mr. Greenleaf, tit. 6, Dower, ch. 2, § 1, in note, where the cases are cited. The law is otherwise in Michigan. Campbell, appellant, 2 Doug. 141.]

(d) Smith v. Spencer, 2 Jur. N. S. 778. [The rule is pretty general in the United States that the wife shall have dower in equity in all lands to which her husband had a complete equitable title at the time

[455] [456] [457]

under the old limitations to bar dower, the widow would now be entitled to dower so far as her husband left the property undisposed of under his power or estate, unless there was a declaration in the deed that she should not be dowable.^(e) But this latter observation applies only where the deed is executed subsequently to the act; for where before the act an estate was conveyed to the usual uses to bar dower, to the intent that the then present or any future wife might not be entitled to dower, and the wife died, and the man married again after the dower act, it was held at the rolls that the second wife was entitled to dower,^(f) and that decision was affirmed by the lords justices, one of them not concurring. Where the old limitations to bar dower were adopted, leaving out the prior power of appointment, it was held that the purchaser had a right to require the concurrence of the trustee to bar dower.^(g)

3. Under the new act every conveyance will bar the wife's dower, so that, although evicted of her jointure, she could not claim her dower against a purchaser of other lands.

4. The new act extends to gavel-kind lands,^(h) but does not affect copyholds, as the freebench in them is generally subject to the husband's power of disposition,⁽ⁱ⁾ nor does it extend to the dower of any widow who married on or before the 1st January 1834, and it is not to give to any will, deed, contract, engagement, or charge executed, entered into, or created before that day, the

of his death. *Shoemaker v. Walker*, 2 S. & R. 554; *Dubs v. Dubs*, 31 Penn. St. 154; *Reid v. Morrison*, 12 S. & R. 18; *Bowie v. Berry*, 1 Md. Ch. 452; *Miller v. Stump*, 3 Gill, 304; *Bowers v. Kee-secker*, 14 Iowa, 301; *Barnes v. Gay*, 7 Iowa, 26; *Peay v. Peay*, 2 Rich. Eq. 409; *Smiley v. Wright*, 2 Ohio, 512; *Gully v. Ray*, 18 Ky. 113; *Lewis v. James*, 8 Humph. 537; *Robinson v. Miller*, 1 B. Mon. 93; *Davenport v. Farrar*, 1 Scam. 314; *Rowton v. Rowton*, 1 Hen. & M. 92; *Hawley v. James*, 5 Paige, 318; *Thompson v. Thompson*, 1 Jones (N. C.), 430. This rule does not prevail in Maine nor in Massachusetts; in those States the wife is not entitled to dower in her husband's equitable estates. *Hamlin*

v. Hamlin, 19 Maine, 141; *Reed v. Whitney*, 7 Gray, 533; *Lobdell v. Hayes*, 4 Allen, 187.]

^(e) *In re Howard's Est.* 5 De G. & Sm. 435; *In re Lush's Est.* *Ib.* 436; *Davey v. Miller*, 17 Jur. 908.

^(f) *Fry v. Noble*, 20 Beav. 598, 7 De G., M. & G. 687; *Clarke v. Franklin*, 4 K. & J. 266; see Sugd. Stat. 250, for observations on *Fry v. Noble*.

^(g) *Collard v. Roe*, 4 De G. & J. 525.

^(h) *Farley v. Boxham*, 2 J. & H. 177.

⁽ⁱ⁾ *Powdrell v. Jones*, 2 Sm. & Gif. 407. The wife of a surrenderee, a purchaser of copyhold, who died without having been admitted, is not entitled to freebench; *Smith v. Adams*, 18 Beav. 499; 5 De G., M. & G. 712.

effect of defeating or prejudicing any right to dower.^(k) It must be borne in mind, that, as to widows within the exception, their rights are saved in estates acquired by their husbands, even after the 1st January, 1834.

5. In other respects the wife's dower is altogether in the power of the husband. For no widow will be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime or by his will, and partial charges in like manner bind her; ^(l) so that now a contract to sell an estate will bind the wife's *right to dower, although her husband die before a conveyance is executed, and he may bar her dower simply by a declaration in a conveyance to him, and he need not execute the deed,^(m) or by a separate deed,⁽ⁿ⁾ or he may bar or restrict her rights by his will,^(o) but in the absence of a bar, she will not be bound by his debts, which are not charged on the land, although mortgages and charges will bind her.^(p) A declaration barring a purchaser's wife of dower, should not now be inserted in the conveyance to him, without instructions to do so,^(q) and although under the trustee act, 1850, the court, where the legal estate is in an infant, will at the purchaser's request, direct the estate to be limited to the usual uses to bar dower, yet it will not allow a declaration to be added that his widow is not to be entitled to dower.^(r)

6. A devise to or for the benefit of the testator's widow, of any land out of which she would be entitled to dower if not devised, or of any interest therein, will disentitle her to dower out of any land of her husband, unless a contrary intention appear by the will.^(s) But unless such an intention be shown, no bequest to the testator's widow of or out of his personal estate, or

(k) S. 14.

(l) S. 4, 5.

(m) *Fairley v. Tuck*, 3 Jur. N. S. 1089.

(n) S. 6.

(o) S. 7, 8. [In several of the States of the Union it is expressly enacted that a provision made for the wife by the will of her husband, shall, in certain cases and on certain contingencies, bar her dower. The statutes on this subject and the decisions in which they have been interpreted, are very fully cited, and referred to in 1

Cruise Dig. by Mr. Greenleaf, tit. 6, Dower, ch. 4, § 24, in note; 4 Kent (11th ed.), 58, 59; *Thompson v. McGaw*, 1 Met. 66.]

(p) *Spyre v. Hyatt*, 20 Beav. 621; *Jones v. Jones*, 4 K. & J. 361.

(q) Sugd. Stat. 248.

(r) *In re Lush's Est.* 5 De G. & Sm. 436; see *In re Howard's Est.* 5 De G. & Sm. 435; *Davey v. Miller*, 17 Jur. 908.

(s) Sect. 9, see *Gibson v. Gibson*, 1 Drew. 42; Sugd. Stat. 253.

of or out of any land not liable to her dower, will defeat her right to dower.(t) What amounts to a sufficient evidence of intention in the absence of express declaration, appears to depend upon the old rules.(u)

7. In purchasing an estate free from dower by force of the act, it should be ascertained that the seller has not bound himself by agreement not to bar his wife's dower.(x)

[7 a. The usual mode of barring dower, in the United States, by the voluntary act of the wife, is by her joining with her husband in a deed of conveyance of the land, containing apt words of release or grant of dower on her part. In some of the states it is necessary that the wife should acknowledge the deed privately before a magistrate, apart from her husband, in the mode prescribed by statute in those states severally. In other states no such acknowledgment is required. This practice is probably coeval with the settlement of the country; and it has been supposed to have taken its rise in Massachusetts, from the colonial act of 1641.(x¹) In Massachusetts, the wife may bar her dower by her husband joining her in a separate release of the land, subsequent to his deed of it, or subsequent to its being taken in execution.(x²) In that state the wife may also join the guardian of her husband in a deed for the like purpose.(x³) If the wife was not of full age at the time of executing a deed releasing her dower,(x⁴) or if the deed does not contain apt words, showing her intention to relinquish her dower, she will not be barred therefrom, though she has signed and sealed the deed, and made the statute acknowledgment.(x⁵) It is no objection that the deed of the wife is a mere release, "in token of her relinquish-

(t) Sect. 10.

(u) Sugd. Stat. 254.

(x) S. 11.

(x¹). [Ancient Charters, 99; 4 Kent (11th ed.), 59; Catlin v. Ware, 9 Mass. 218; Lufkin v. Curtis, 13 Mass. 223; Powell v. Monson & B. Manuf. Co. 3 Mason, 347, 351; Hall v. Savage, 4 Mason, 273; Leavitt v. Lamprey, 13 Pick. 382; Priest v. Cummings, 16 Wend. 617; Markham v. Merrett, 7 How. (Miss.) 437; Thomas v. Gammel, 6 Leigh, 9; Gen. Sts. Mass. c. 90, § 8. When the statute has directed the form of acknowledgment, it must be strictly pursued. Kirk v. Dean,

2 Binn. 341; Clarke v. Redman, 1 Blackf. 379; Scanlan v. Turner, 1 Bailey, 421.]

(x²) [Fowler v. Shearer, 7 Mass. 14, 20; Stearns v. Swift, 8 Pick. 530; Lithgow v. Kavenagh, 9 Mass. 161, 173; Shaw v. Russ, 14 Maine, 432; Gen. Sts. Mass. c. 90, § 8. But the wife cannot bar her right of dower by any release made to her husband during coverture. Rowe v. Hamilton, 3 Greenl. 63.]

(x³) [Gen. Sts. Mass. c. 108, § 11.]

(x⁴) [Oldham v. Sale, 1 B. Mon. 77.]

(x⁵) [4 Kent (11th ed.), 49; Catlin v. Ware, 9 Mass. 218; Lufkin v. Curtis, 13

ment of dower," containing no words of grant; for it operates by way of estoppel, and not by way of grant.(x⁶)]

II. As to Descents.(x⁷)

8. We must be content to refer shortly to the new law.(y) Descent is now to be traced *from the purchaser*, and the person last entitled is deemed the purchaser, unless it shall be proved that he inherited the estate, which principle is carried throughout; (z) and actual seisin being rendered unnecessary, all rights and estates, whether in remainder, &c., or not, and whether the party had possession or received the rents or not, are now made the foundation of a right in the first purchaser, from whom the descent is to be traced.(a)

9. This provision renders it necessary to prove a descent at every *step, in order to exclude the last possessor's title as a purchaser; but it does not exclude such proof, and, therefore, where it can be obtained, the descent will be traced as it has actually taken place, subject to the provisions of the act. It is probable that sellers under contracts, relying upon this provision, will withhold or not search for evidence of descent; but the courts will not allow such a scheme to prevail, for a purchaser would be entitled to evidence that a person assumed to be the

Mass. 223; *Leavitt v. Lamprey*, 13 Pick. 382; *Stevens v. Owen*, 25 Maine, 94.]

(x⁶) [*Stearns v. Swift*, 8 Pick. 532.]

(x⁷) [The rules of descent of inheritances in the several States of the Union, have been digested and stated at length by Mr. Greenleaf, in 2 Cruise Dig. tit. 29, Descent, ch. 3, at the end. See, also, 4 Kent (11th ed.), lect. 65, where the leading principles of the law of descent in the United States are stated. In the United States, as Chancellor Kent observes, the English common law of descent, in its most essential features, has been universally rejected, and each State has established a law for itself. The laws of the individual States may agree in their great outlines, but they differ exceedingly in the details. There is no entire, though there is an essential, uniformity on this subject. 4 Kent (11th ed.), 374.]

(y) 3 & 4 Will. 4, c. 106; Sugd. Stat. (2d ed.) 256.

(z) S. 2; s. 4, as to limitations to the heirs, &c., of any of the ancestors of the party entitled.

(a) S. 1; *Ingilby v. Amcott*, 21 Beav. 585. [The former English maxim, *seizina facit stipitem*, has been very generally abolished in the United States. A few of the States, however, still retain the principle of it. The reader is referred to the statutes of the several States on the subject, as also to 4 Kent (11th ed.), 388 *et seq.*; 2 Cruise Dig. by Mr. Greenleaf, tit. 29, Descent, ch. 3, § 1, note, vol. 3, p. 327; *Cook v. Hammond*, 4 Mason, 467; *Miller v. Miller*, 10 Met. 393; *Russell v. Hoar*, 3 Met. 187; *Williams v. Amory*, 14 Mass. 20; *Whitney v. Whitney*, 14 Mass. 88.]

purchaser really was such, and would not be compelled to rest on the provision of the statute, which would be inoperative against proof of descent.

10. Under this section a son claiming by descent from an illegitimate father who was the purchaser, could not transmit the estate by descent upon the failure of his own issue to his heir *ex parte maternâ*, although it is said such a result could hardly have been contemplated by the framers of the act.(b) But this has now been provided for, and in such a case, instead of escheating, the land will descend, and the descent be traced from the person last entitled to it as if he had purchased it.(c)

11. And the heir taking under the will of a testator dying after 31st December, 1833, will take as a devisee, and not by descent, and any limitation by an assurance executed after that day to the grantor, or to the heirs of the grantor, will vest in such person as a purchaser, and will not be considered as his former estate.(d) The heir now takes so absolutely as devisee, that pecuniary legatees are not entitled to have the assets marshalled as against him.(e)

12. And now every descent from a brother or sister is to be traced through the parent,(f) and every lineal ancestor is capable of being heir to any of his issue; so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue;(g) and in descents, males are to be preferred to females,(h) so that paternal ancestors are to be preferred to maternal; and as between paternal ancestors, males are to be preferred to females; and as between maternal ancestors, males are to be preferred to females, and the descendants succeed to the line. And where there is a failure of male paternal ancestors of

(b) *Doe v. Blackburn*, 1 Moo. & Ro. 547; see *Re Don's Est.* 4 Drew. 194. [The condition of illegitimate children in regard to their right to inherit, and their capacity to transmit property, has been variously regulated by statutes of the several States, some of which are referred to in 2 Cruise Dig. by Mr. Greenleaf, vol. 3, tit. 29, Descent, ch. 2, § 8, note; 4 Kent (11th ed.), 413-417.]

(c) 22 & 23 Vict. c. 35, s. 19, 20, *inf.* ch. 12, s. 4.

(d) S. 3.

(e) *Strickland v. Strickland*, 10 Sim. 374; *Biederman v. Seymour*, 3 Beav. 368. (f) S. 5; *Collingwood v. Pace*, 1 Vent. 413.

(g) S. 6. [See 4 Kent (11th ed.), 392, 393 *et seq.*]

(h) S. 7. [Generally, no such preference is made in any of the United States. 2 Cruise Dig. by Mr. Greenleaf, tit. 29, Descent, ch. 3, § 16, note, § 17, & note.]

the person from whom the descent is to be traced and their descendants, Blackstone's well known view is adopted, which it is conceived is the true rule.⁽ⁱ⁾

13. And at length the half blood is admitted, so that the brother of the half blood on the part of the father will inherit next after the * sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother will inherit next after the mother.^(k) And lastly, the attainder of any person through whom the descent is to be traced, who shall have died before such descent shall have taken place, is not to work an impediment, unless the land shall have escheated in consequence of such attainder before the 1st day of January, 1834.^{(l)(1)}

14. But the act does not extend to any descent which took place on the death of any person who died before the said 1st day of January, 1834,^(m) and where any assurance executed before the 1st day of January, 1834, or the will of any person who died before the same 1st day of January, 1834, contains any limitation or gift to the heir or heirs of any person, under which the person or persons answering the description of heir is entitled to an estate by purchase, then the person or persons who would have answered such description of heir, if the act had not been made, is entitled by virtue of such limitation or gift, whether the person named as ancestor shall or shall not have been living on or after the 1st day of January, 1834.⁽ⁿ⁾

(i) S. 8. [See 4 Kent (11th ed.), 390, Humph. 588. In other States a preference exists in favor of the whole blood, but in none is the half blood totally excluded. 29, Descent, ch. 3, § 21, in note.]

(k) S. 9. [In some of the States no essential distinction is made between the whole and the half blood. See 4 Kent (11th ed.), 403; Prescott v. Carr, 29 N. H. 453; Hatch v. Hatch, 21 Vt. 450; Brown v. Burlingham, 5 Sandf. 418; Beebe v. Griffing, 14 N. Y. 235; Valentine v. Wetherell, 31 Barb. 655; Nichol v. Dupree, 7 Yerger, 415; Butler v. King, 2 Yerger, 115; Dradrich v. Armour, 10

(l) S. 10.

(m) S. 11.

(n) S. 12.

(1) 55 Geo. 3, c. 145, saving the right of the heir in cases of attainder for felony with the exceptions of high treason, petit treason, or murder, or of abetting, &c., the same.

15. The intention of the act was to put an end to the necessity of an actual seisin in the purchaser, and the doctrine of a *possessio fratris* is at an end, for the act provides, as we have seen, for the half blood without allowing it to be excluded by such a possession.

16. In tracing a pedigree under the act, it should be borne in mind that a man may be a purchaser as the person last entitled, although he never obtained possession of the estate, nor received any of the rents, and that reversions and possessions, and even possibilities, are now placed on the same footing.^(n¹) The ascending line, father, grandfather, and so on, in the scale, take in the place of, and in preference to, their descendants, who take immediately in succession to them, just as if they, the ancestors, had had successive estates tail; therefore, if a son purchase an estate and die without issue, leaving a father, brothers, and sisters, the brothers and sisters will now be postponed to the father. And the half blood are now admitted, except that the preference is given to the whole blood of the first purchaser as between his kindred in equal degree or their descendants.

17. Where a woman, one of three coparceners, whose father was the purchaser, died intestate, leaving a son the whole of her estate, was held to descend to him unaffected by the act, whereas if the *act extended to such a case, the descent would be traced from the father, and the share of the deceased daughter would descend to her surviving sisters and to her own son in coparcenary, so that each of the surviving sisters would take four ninths and the son one ninth only of the estate.^(o) A case in the court of Sydney, to which my attention has been called,^(p) in which it was decided, with some difference of opinion, that an heir taking by descent under his great-grandfather, who was the first purchaser, was held bound by a covenant entered into by his grandmother, who enjoyed the estate under her father, the great-grandfather of the heir. It is a point of much nicety, upon

(n¹) [In the United States, the general doctrine is, that no entry is necessary where the ancestor died actually seised, or where the possession was vacant, the ancestor having the right. 2 Cruise Dig. by Mr. Greenleaf, tit. 29, ch. 1, § 4, in note.]

(o) *Cooper v. France*, 10 L. J. N. S. Ch. 313; 14 Jur. 214; Sugd. Stat. 265; see *Muggleton v. Barnett*, 1 H. & N. 282; 2 H. & N. 653.

(p) *Badhan v. Shiel*, 7 Jur. N. S. 509; it was not published in time for the writer's second edition of the statutes.

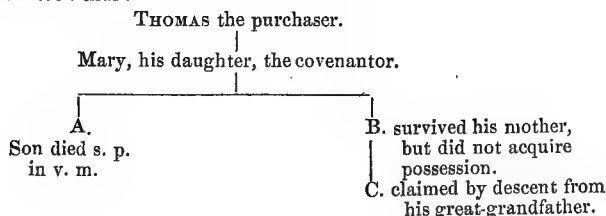
which there has been a difference of opinion: the writer inclines to agree with the decision, for the act of parliament does not seem to have discharged the heir from any liabilities imposed by the immediate ancestor, although the descent operates in other respects as from the first purchaser.(1)

18. By the 7 & 8 Vict. c. 66, every person born out of her majesty's dominions of a mother being a natural born subject, is made capable of taking to him, his heirs, executors, or administrators any estate, real or personal, by devise or purchase, or inheritance of succession.(q) And a woman married to a natural born subject or person naturalized is herself naturalized.(r) And now any natural born subject of the crown, or any person whose right to be deemed a natural born subject depends wholly or in part on his legitimacy or on the validity of a marriage, being domiciled in England or Ireland, or claiming any real or personal estate situate in England, may apply by petition to the court for divorce praying a decree declaring that the petitioner is *the legitimate child of his parents*, and that *the marriage of his father and mother, or of his grandfather and grandmother* was a valid marriage, or declaring either of the matters aforesaid. And any such subject or person being so domiciled or claiming as aforesaid, may in like manner apply to such court for * a decree declaring that *his marriage* was or is a valid marriage. And power is given to the court to declare the legitimacy or illegitimacy of such person, or the validity or invalidity of such marriage; and any person so domiciled or claiming as aforesaid may apply by petition to the same court for a decree declaratory of his right to be deemed a natural born subject; but proper parties are to be cited, and any such sentence or decree is not to prejudice any person if subsequently proved to have been obtained by

(q) S. 3; see s. 13.

(r) S. 16.

(1) The pedigree stood thus:



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fraud or collusion. And the like power of declaring any person a natural born subject is extended to the court of session where he is domiciled in Scotland, or claims any heritable or movable property there.(s) And an appeal is given to the House of Lords against all sentences and final judgments under the act.(t)(1)

III. As to Wills.

19. We have already considered the operation of the new statute,(u) so far as it is likely to bear upon contracts. We need, therefore, only observe generally that the testamentary power is now complete over vested and executory interests of every description, and over future as well as present estates, for every will speaks as if it had been executed immediately before the death of the testator, unless a contrary intention appear by the will.(x) Lapsed devises, as well as such as fail by reason of

(s) 21 & 22 Vict. c. 93; see *In re Shedden*, 5 Jur. N. S. 151; *Shedden v. Patrick*, 2 Swa. & Trist. 170; an appeal is now pending in the Lords. The divorce court acts are 20 & 21 Vict. c. 85; 21 & 22 Vict. c. 108; and 22 & 23 Vict. c. 61.

(t) 22 & 23 Vict. c. 61, s. 7.

(u) 1 Vict. c. 26; *sup.* pp. 189, 190.

(x) S. 3, 4, 5, 6; *O'Toole v. Browne*, 3 E. & B. 572; *Webb v. Byng*, 1 K. & J. 580; which consider; *sup.* pp. 189, 191; *Ingilby v. Amcotts*, 21 Beav. 585. [All contingent, possible estates are devisable, for there is an interest. 4 Kent (11th ed.), 510. A will may operate on a contingent reversionary interest. *Brigham v. Shattuck*, 10 Pick. 306, 309; *Hayden v. Stoughton*, 5 Pick. 528; *Austin v. Cambridgeport Parish*, 21 Pick. 215; *Glover v. Spendlove*, 4 Bro. C. C. (Perkins's ed.) 337, 338, note (a). A power to sell lands, coupled with an interest, may be devised. *Wright v. Trustees Meth. Epis. Church*, 1 Hoff. Ch. 204. A reversion expectant on the

determination of an estate tail is a vested interest, which may be devised. *Steel v. Cook*, 1 Met. 281; see *Shelby v. Shelby*, 6 Dana, 60. So in Delaware, the interest of a devisee over in an executory devise. *Kean v. Roe*, 2 Harr. 103. In *Deas v. Horry*, 2 Hill (S. Car.) Ch. 248, Mr. Justice Harper was of opinion that a possibility of reverter was not devisable, for it was not a possibility coupled with an interest, but a mere naked possibility. But a possibility coupled with an interest is devisable. *Den v. Manners*, 1 Spencer, 142. In Maryland an equitable interest is devisable. *Carrol v. Norwood*, 5 Harr. & J. 162. So a possibility of a legacy's vesting. *Spence v. Robbins*, 6 Gill & J. 507. Rights of entry are devisable by statute in Massachusetts. So lands, of which the devisor was disseised after making his will, may pass by the will. Gen. Sts. c. 92, § 3. It was otherwise before the statute. *Poor v. Robinson*, 10 Mass. 131; *Smithwick v. Jordan*, 15 Mass. 115.

(1) A bill was this session (1862) introduced in the Lords to enable any of the parties in proceedings under the act to require a jury, but was not persevered in. It does not seem a desirable extension of the law. There is no contest for the right to property.

their being contrary to law, or incapable of taking effect, fall into the residue ; (y) and a general devise will include estates of every tenure, (z) and lands over which the testator has a general power, and this extends to personal estate also ; (a) but in all these cases a contrary intention must not appear. (b) The fee will now pass without words of limitation, (c) and the words "die without issue" of any person, or the like, now mean in the cases provided for, or failure of issue in the lifetime or at the death of the

In Pennsylvania it seems a testator may devise lands of which he was disseised. *Humes v. McFarlane*, 4 Serg. & R. 435. So in Maine by statute ; Rev. St. 1841, p. 376. So in New York ; *Jackson v. Varrick*, 2 Wend. 166 ; S. C. 7 Cowen, 238. In Virginia ; *Watts v. Cole*, 2 Leigh, 664. See *Stoever v. Whitman*, 6 Binn. 416 ; *Waring v. Jackson*, 1 Peters (U. S.), 571 ; *Gist v. Robinson*, 3 Bibb, 2 ; *Carroll v. Norwood*, 4 Harr. & M'H. 287. The settled test of a devisable interest in some parts of the United States is, that it is every interest in lands that is descendible. 4 Kent (11th ed.), 512, 513. A right of entry is devisable by statute in New Hampshire. Rev. St. N. H. 1842, c. 156, § 3 ; *Whittemore v. Bean*, 6 N. H. 47 ; *Hudock v. Wilmarth*, 5 N. H. 181. So in Vermont. Rev. St. Vt. 1839, p. 254. As to Connecticut, see *Brewster v. M'Call*, 15 Conn. 289, 290. It has been provided by statute in most of the United States, that after-acquired lands shall pass by the will, if such was the intent of the testator. In some of the States this intent must be plainly apparent on the face of the will ; in others it may be gathered by construction ; and in a few of the States such lands will be deemed to pass by the will, unless excluded by the terms of the will. 1 Jarman Wills (4th Am. ed.), 305-307, & notes ; 3 Cruise Dig. by Mr. Greenleaf, tit. 38, Devise, ch. 3, § 32, in note, vol. 6, p. 31, in note ; *Cushing v. Alwyn*, 12 Met. 169 ; *Pray v. Waterston*, 12 Met. 262 ; 4 Kent (11th ed.), 511-513 ; *Walton v. Walton*, 7 J. J. Marsh. 58 ; *Smith v. Jones*, 4 Ham.

115 ; *Willis v. Watson*, 4 Scam. 64 ; *Lig-gat v. Hart*, 23 Missou. 127 ; *Carroll v. Carroll*, 16 How. (U. S.) 275 ; *Loveren v. Lamprey*, 22 N. H. 434 ; *De Peyster v. Clendenning*, 8 Paige, 295 ; *Smith v. Ed-rington*, 8 Cranch, 66 ; *McCulloch v. Sou-der*, 5 Watts & S. 198 ; *Battle v. Speight*, 9 Ired. 288. In some of the States after-acquired real estate does not pass by the will ; see *Ross v. Ross*, 12 B. Mon. 437 ; *Succession of Valentine*, 12 La. An. 286 ; *Bowen v. Johnson*, 6 Ind. 110 ; *Dennis v. Dennis*, 5 Rich. 468 ; *Landrum v. Hatcher*, 11 Rich. Law, 154 ; *Watson v. Child*, 9 Rich. Eq. 129 ; *Raines v. Barker*, 13 Gratt. 128 ; *Gibson v. Carsell*, 13 Gratt. 136 ; *Clements v. Kyles*, 13 Gratt. 468.]

(y) S. 25. [See 1 Jarman Wills (4th Am. ed.), 310 *et seq.* & notes.]

(z) S. 26 ; *Wilson v. Eden*, 16 Beav. 153.

(a) S. 27 ; *Collard v. Sampson*, 16 Beav. 543, 4 De G., M. & G. 224 ; *Lake v. Currie*, 2 De G., M. & G. 536 ; *West v. Ray*, 1 Kay, 385 ; *Orange v. Pickford*, 4 Drew. 363.

(b) *Emuss v. Smith*, 2 De G. & Sm. 722 ; *Wisden v. Wisden*, 2 Sm. & Gif. 396.

(c) S. 28 ; as to devises to trustees, see s. 30, 31 ; Sugd. Stat. 389. [A similar rule exists in the statutes of most, if not all of the States of the Union. 2 Jarman Wills (4th Am. ed.), [171] 125 *et seq.* & notes ; 4 Kent (11th ed.), 7, 8, 537, 538 ; 3 Cruise Dig. by Mr. Greenleaf, tit. 38, Devise, ch. 11, & notes, vol. 6, p. 207 *et seq.*]

person.(d) And lapse is prevented, unless in either case a contrary *intention appear by the will, 1. Where any devisee in tail or in *quasi* in tail die in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator; for such devise will take effect as if the death of such person had happened immediately after the death of the testator;(e) 2. Where any person, being a child or other issue of the testator, to whom any estate is devised or bequeathed for an interest not determinable at or before the death of such person, die in the lifetime of the testator leaving issue, and any *such* issue of such person shall be living at the time of the death of the testator; for such devise or bequest will take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.(f) And, contrary

(d) S. 29; Doe v. Ewart, 7 Ad. & El. 665; Morris v. Morris, 17 Beav. 198; Greenway v. Greenway, 1 Giff. 131, 2 De G., F. & J. 128; Dodds v. Dodds, 10 Ir. Ch. Rep. 476. [In several of the United States there are express enactments providing that when an estate is limited to take effect upon the death of the first taker *without issue* or *without heirs* or *without heirs of his body*, it shall be understood to intend issue or heirs *living at the time of the decease of the person named as ancestor*. Such is the law in New York, Virginia, North Carolina, Mississippi, Missouri, Indiana, and Michigan. 3 Cruise Dig. by Mr. Greenleaf, vol. 6, tit. 38, Devise, ch. 17, § 23, in note, where the statutes are referred to; 4 Kent (11th ed.), 279, 280; 2 Jarman Wills (4th Am. ed.), ch. 42, & notes.]

(e) S. 33.

(f) S. 33; Johnson v. Johnson, 3 Hare, 157; Fulford v. Fulford, 16 Beav. 565; Winter v. Winter, 5 Hare, 306; Mower v. Orr, 7 Hare, 473; Wisden v. Wisden, 2 Sm. & Gif. 396; Gale v. Gale, 21 Beav. 349; Olney v. Bates, 3 Drew. 1; Browne v. Hammond, 1 John. 210; Griffiths v. Gale, 12 Sim. 354. ["Provisions similar in substance, but somewhat varying in details, exist in most of the United States. Thus

in Maine, Massachusetts, Vermont, Ohio, Michigan, and Missouri, it is only where the devise is to 'a child or other relation' of the testator, that the devise does not lapse. In New York, New Jersey, Pennsylvania, Virginia, Indiana, Mississippi, and Arkansas, the provision applies only to the case, 'where the devisee is a child or other descendant' of the testator. In Connecticut and Illinois the devisee must be either 'a child or a grandchild' of the testator. And in New Hampshire, Rhode Island, and Georgia, the provision extends to a gift to 'any legatee or devisee' whomsoever. It is further qualified in South Carolina, by the condition that if any child die in the lifetime of the parent testator, leaving issue, any legacy given to the child shall go to his or her issue, unless such deceased child was equally portioned with the other children, by the parent when living. LL. So. Car. vol. 5, p. 107. If the devisee dies leaving no issue living at the death of the testator, the case is not within any of the above statutes, and of course the devise lapses by the common law. Fisher v. Hill, 7 Mass. 86; Ballard v. Ballard, 18 Pick. 41." 3 Cruise Dig. by Mr. Greenleaf, vol. 6, tit. 38, ch. 8, § 23, in note; 1 Jarman Wills (4th

to prior authority, and, as it seems, to the intention and true construction of the act, it has lately been decided that the word *such* is to be disregarded, and that the existence of any issue will prevent a lapse.(g)

20. The statute prohibits an infant from making a will even of personalty,(h) but it leaves to a married woman the same power which she had before the act passed.(i) It requires all wills to be executed with the like solemnities in the presence of, and to be attested by two witnesses,(k) and publication is no longer necessary, nor is an attestation clause necessary.(l) We must refer elsewhere for the manner in which the testator and his witnesses may sign and attest the will.(m) The act has special provisions in regard to the revocation and the revival of wills, for which we must refer to the statute itself;(n) but we may observe that now the act of cancellation must be executed as a proper will, to give effect to it as a revocation;(o) and no revocation will be effected by change of estate as to the devisable interest in the testator at his death,(p) but that marriage of either a man or woman will operate a revocation.(q) There

Am. ed.) [239], 311-313, in note; 4 Kent (11th ed.), 541, 542. It has been decided in Massachusetts that a wife is not a relation within the meaning of the terms "or other relation" as above employed. *Esty v. Clark*, 101 Mass. 36.]

(g) *In re Jane Parker*, 1 Swa. & Trist. 523; 6 Jur. N. S. 354; see *Barkworth v. Young*, 4 Drew. 1; Sugd. Stat. 392.

(h) S. 7. [See 1 Jarman Wills (4th Am. ed.), 29, 30, and cases cited.]

(i) Sect. 8; [1 Jarman Wills (4th Am. ed.), 30-37, and cases cited; 4 Kent (11th ed.), 505, 506; changes in the law upon this subject are so frequent that safety consists only in a constant observation of the statutes.]

(k) 15 Vict. c. 24; see Sugd. Stat. (2d edit.) 335; *In re Brown*, 16 Jur. 602; *Dinmore's case*, 2 Rob. 641; *In re Peach*, 1 Swa. & Trist. 138; *Page v. Donovan*, 3 Jur. N. S. 220. [See 1 Jarman Wills (4th Am. ed.), 114 *et seq.* & notes.]

(l) *Bryan v. White*, 2 Robert, 315. [See 1 Jarman Wills (4th Am. ed.), 118 *et seq.* & notes.]

(m) Sugd. Stat. 338-347; 15 Vict. c. 24; *In re Walker*, 8 Jur. N. S. 218; *In re John Gausden*, 31 L. J. N. S. 53. [See 1 Jarman Wills (4th Am. ed.), 114 *et seq.* & notes.]

(n) See Sugd. Stat. ch. 8, s. 2, p. 348. [See 1 Jarman Wills (4th Am. ed.), 150 *et seq.*]

(o) S. 21; see s. 20; *Doe v. Harris*, 8 Ad. & El. 13; *Hobbs v. Knight*, 1 Curt. 708. [See 1 Jarman Wills (4th Am. ed.), 159 *et seq.* & notes.]

(p) S. 23; see *Cooper v. Martell*, 2 Jur. N. S. 745, *sup.* [See 1 Jarman Wills (4th Am. ed.), 172 *et seq.* & notes; 3 Cruise Dig. by Mr. Greenleaf, vol. 6, tit. 38, § 58 *et seq.* & notes; *Walton v. Walton*, 7 John. Ch. 258. In *Re Cooper's Estate*, 4 Barr, 88, it was held that a sale by a testator, after making his will, of so great a part of the real estate devised, as to render it impossible to give effect to the dispositions of the will, will amount to a revocation of the will.]

(q) S. 18; *Marston v. Roe*, 8 Ad. & El. 14; *In re Pugh*, 1 Eccl. & Ad. Rep. 416;

are now only four modes in which a will can be revoked, viz: 1. By another inconsistent will or writing executed in the same * manner as the original will; (*q*¹) 2. By burning or any other act of the same nature; (*q*²) 3. By the disposition of the property by the testator in his lifetime; (*q*³) 4. By marriage. (*q*⁴) By the first and third of these modes the will may be revoked either entirely or in part; (*q*⁵) by the second and last, the revocation will be complete.

21. It remains to simply refer to two recent statutes which were passed to render valid the wills of British subjects made abroad of their personal estate, notwithstanding the law of domicile. (*r*)

SECTION II.

OF TITLE UNDER TENANT IN TAIL. (1)

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| <p>1. New law: 3 & 4 W. 4, c. 74. — Where defects in existing recoveries are amended. — Ancient demesne. — Court without jurisdiction. — Errors apparent from deed amended in fines. — So in recoveries. — How acted upon. — Recoveries defective rendered valid.</p> | <p>2. Tenant in tail can acquire the fee simple. — Estates tail in contingency or divested. — Confirmation of voidable estate.</p> <p>3. Protector.</p> <p>4. Where a seller of a remainder may bar it.</p> |
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In re Cadywold, 1 Swa. & Trist. 34; *In re Terrible*, *Ib.* 146; [1 Jarman Wills (4th Am. ed.), 150 *et seq.* & notes.]

(*q*¹) [1 Jarman Wills (4th Am. ed.), 189 *et seq.* & notes.]

(*q*²) [1 Jarman Wills (4th Am. ed.), 159 *et seq.* & notes; 4 Kent (11th ed.), 520, 521, & notes; 3 Cruise Dig. by Mr. Greenleaf, vol. 6, tit. 38, Devise, ch. 6, § 2, note, § 19, note; *Nelson v. McGiffort*, 3 Barb. Ch. 158; *In re Thompson*, 11 Paige, 453; *McBeth v. McBeth*, 11 Ala. 596; *Durant v. Ashmore*, 2 Rich. 184.]

(*q*³) [1 Jarman Wills (4th Am. ed.), 172 *et seq.* & notes.]

(*q*⁴) [1 Jarman Wills (4th Am. ed.), 150 *et seq.* & notes.]

(*q*⁵) [A conveyance by the testator in his lifetime of only a part of the estate devised in his will, is but a revocation *pro tanto*, and furnishes no reason why there should not be a probate of the will. See *Hawes v. Humphrey*, 9 Pick. 350; *Brush v. Brush*, 11 Ohio, 287, and other cases cited in 1 Jarman Wills (4th Am. ed.), 173, note (1).]

(*r*) 24 & 25 Vict. c. 114; 24 & 25 Vict. c. 121, which are fully considered in Sugd. Stat. (2d edit.) 397.

(1) 4 & 5 W. 4, c. 92, for Ireland; 20 & 21 Vict. c. 60; Sugd. Stat. (2d edit.) ch. 2, p. 184. [The entire subject of barring entailed estates in the United States has been adjusted and settled by statute regulations. Mr. Chancellor Kent says that the doctrine of estates tail and the complex and multifarious learning connected with it, have become quite obsolete in most parts of the United States. 4 Kent (11th ed.), 14, 15.

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| <p>5. Base fee may still be acquired by tenant in tail in remainder.</p> <p>6. Power of protector absolute. — His consent necessary. — Uncontrollable. — Consent cannot be revoked. — Married woman's consent as protector.</p> <p>7. Contracts by tenant in tail of no force, except as against himself.</p> <p>8. How assurance is to be enrolled, &c. — Married woman tenant in tail.</p> <p>9. Protector how to consent.</p> <p>10. Equitable jurisdiction excluded. — Equitable estates tail. — Base fee independently of act. — Confirmation of voidable estate.</p> <p>11. Estates <i>pur autre vie</i> and chattels, excluded.</p> <p>12. Purchaser's title under the act. — Legal and equitable tenants in tail.</p> <p>13. Of copyholds. — How to convey: consent of protectors. — Where the consent is not by deed.</p> <p>14. Equitable tenant in tail of copyholds. —</p> | <p>Prior purchaser without notice protected. — Enrolment.</p> <p>15. Power of commissioners of bankrupt over estates tail and base fees.</p> <p>16. Consent of protector: bankruptcy.</p> <p>17. Base fee in purchaser enlarged by act.</p> <p>18. Where voidable estate confirmed by act of commissioner. — Saving of right of a purchaser without express notice.</p> <p>19. Bankrupt's estate.</p> <p>20. Dispositions by married women. — Power of married woman not tenant in tail. — May release right of dower.</p> <p>21. Powers: deeds: married women.</p> <p>22. Surrenders of copyholds by married women. — Power to dispense with husband's concurrence.</p> <p>23. Enrolment, &c., of deeds executed by her as tenant in tail, protector, or owner.</p> <p>24. May disclaim by deed: disposition of contingent interests.</p> <p>25. Operation of enrolment. — Conflicting rights of purchasers.</p> |
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1. THE new law has several provisions bearing upon present titles and upon future contracts and conveyances to purchas-

This is not, however, universally true. Estates tail still exist, and are recognized as valid estates in Maine, Massachusetts, Rhode Island, Delaware, Pennsylvania, and Maryland. But in all these States, the estates tail may be barred by a deed of conveyance in fee simple, and in Rhode Island, by devise in fee simple, by the tenant in tail. See 1 Cruise Dig. by Mr. Greenleaf, vol. 1, tit. 2, Estates Tail, ch. 2, § 44; 4 Kent (11th ed.), 14, 15, in note; *Lithgow v. Kavenagh*, 9 Mass. 167, 170, 173; *Nightingale v. Burrell*, 15 Pick. 104; *Corbin v. Healy*, 20 Pick. 514; *Riggs v. Sally*, 15 Maine, 408; *Perry v. Briggs*, 12 Met. 17; *Lapsley v. Lapsley*, 9 Barr, 130; *Parker v. Parker*, 5 Met. 134; *Eichelberger v. Burnitz*, 9 Watts, 447; *Elliott v. Pearsoll*, 8 Watts & S. 38; *Laidler v. Young*, 2 Harr. & J. 69; *Ridgley v. McLaughlin*, 3 Harr. & M'H. 220; *Cuffee v. Milk*, 10 Met. 366; *Wheatland v. Dodge*, 10 Met. 502; *Hall v. Thayer*, 5 Gray, 523; *Buxton v. Uxbridge*, 10 Met. 87; *Hayward v. Howe*, 12 Gray, 49; *Allen v. Ashley School Fund*, 102 Mass. 262; *Holland v. Cruft*, 3 Gray, 162; *Whittaker v. Whittaker*, 99 Mass. 364; Gen. Sts. Mass. c. 89, § 4, 8; c. 90, § 36. Estates tail cannot be barred by will in Massachusetts. They are expressly excepted from the operation of a last will and testament. *Hall v. Priest*, 6 Gray, 24; Gen. Sts. c. 92, § 1. In Massachusetts, as at common law, an estate tail descends to the oldest son, and to the oldest son of the oldest son. *Wight v. Thayer*, 1 Gray, 284. Mr. Greenleaf says that estates tail are expressly turned into and made fees simple absolute in the donee in tail, in Connecticut, New York, Virginia, North Carolina, Georgia, Kentucky, Tennessee, Indiana, and Michigan. Such also, he says, is the case in Mississippi and in Alabama; but conveyances in Mississippi are expressly permitted to be made to a succession of donees then living, and to the heirs of the body of the remainder-man, and on failure of these, to the right heirs of the donor. In the States of New Jersey

ers.(a) Fines * and recoveries of land in ancient demesne, levied or suffered in superior courts, are rendered valid as between the conusors and the vouchees, and all persons claiming under them, although they may still be reversed as to the lord.(b) And although there shall have been no reversal of fines or recoveries of ancient demesne levied or suffered in the superior courts, yet fines or recoveries subsequently levied or suffered in the manor courts are made operative notwithstanding the change of tenure by the former fines or recoveries.(c) These provisions remove the difficulties which constantly arose upon titles to lands in ancient demesne; and writs of deceit are abolished, and the tenure of ancient demesne restored, where the right of the lord had been acknowledged within twenty years, notwithstanding unreversed fines or recoveries in the superior courts.(d) And fines and recoveries are made valid although levied or suffered in a court within whose jurisdiction the lands do not lie, or in a

(a) 3 & 4 Will. 4, c. 74 (August 28, 1833). (c) S. 5.

(b) S. 4.

(d) S. 6.

and Missouri, the donee in tail takes only a life estate with remainder to the issue as tenants in common, in fee simple absolute. In Illinois, Vermont, and Arkansas, also, the donee takes an estate for life, with remainder in fee simple to him who would first take, *per formam doni*, on the decease of the first tenant in tail. In Ohio, the law seems in effect the same, it being enacted that all estates tail shall become fees simple in the issue of the first donee in tail. 1 Cruise Dig. by Mr. Greenleaf, vol. 1, tit. 2, Estates Tail, ch. 2, § 44, and notes, where the statutes of the States are referred to; 4 Kent (11th ed.), 14, 15, note; James v. Dubois, 1 Harr. 285; Den v. Small, 1 Spencer, 151; Wells v. Newbold, 1 Taylor, 166; S. C. Cam. & Nor. 375; Sanders v. Hyatt, 1 Hawkes, 247; Bramble v. Billups, 4 Leigh, 90; Thomason v. Andersons, 4 Leigh, 118; Ross v. Toms, 4 Dev. 376; Roach v. Martin, 1 Harr. 548; Giddings v. Smith, 15 Vt. 344; Doe v. Craiger, 8 Leigh, 449; Den v. Zabriskie, 3 Green, 404; Deboe v. Lowen, 8 B. Mon. 616; Van Rensselaer v. Kearney, 11 How. (U. S.) 297; Lott v. Wyckoff, 1 Barb. 565; Wiley v. Smith, 3 Kelly, 551. Entails are prohibited in Florida, and are no longer recognized in Wisconsin. 4 Kent (11th ed.), 15, note. In the States of South Carolina and Louisiana, Mr. Chancellor Kent says, estates tail do not appear to be known to their laws, or ever to have existed. Mr. Greenleaf attributes to the statute of South Carolina, and to an article in the declaration of rights in the constitution of Texas, the effect to turn fees tail into fees simple absolute in the donee in tail. 1 Cruise Dig. by Mr. Greenleaf, vol. 1, tit. 2, Estates Tail, ch. 2, § 44. Estates tail no longer exist in New Hampshire. Jewell v. Warner, 35 N. H. 176. A deed by husband and wife conveying estates of which they are seised in her right in fee tail, will bar the entailment in Massachusetts, provided the requisites of the statute for barring entails have been complied with. Nightingale v. Burrell, 15 Pick. 104.]

court unlawful or held without due authority, where persons have assumed to hold courts in which fines or recoveries have been levied or suffered.(e) And errors apparent from the deed declaring the uses of any fine in any of the proceedings of such fine, in the name of the conusor or conusee, or any misdescription or omission of lands intended to have been passed by such fine, are cured by the act itself.(f) So in like manner errors apparent from the deed making the tenant to the *præcipe* in a recovery, in any of the proceedings of such recovery, in the name of the tenant, demandant, or vouchee, in such recovery, or any description or omission of lands intended to have been passed by such recovery, are cured by the act itself.(g) And the court of common pleas will not, to satisfy the scruples of a purchaser, amend a fine or recovery which the act has declared valid without amendment,(h) nor indeed does it seem that the court has now jurisdiction in such cases. Recoveries, whether suffered before or after the act, are rendered valid, although the bargain and sale to make the tenant to the *præcipe* was not enrolled in due time; (i) and no recovery (k) is to be invalid in consequence of any person having a *legal* estate not having joined in making the tenant to the *præcipe*, provided the tenant shall have been made by a person who had an estate in possession not less than for a life, in the rents or surplus after payment of charges thereon, and whether there be any actual surplus or not; and an estate is to be deemed to be in possession notwithstanding any * prior leases for lives or years at a rent, or any term of years without rent. But this does not extend to fines or recoveries so far as they had been reversed; nor where any person who would have been barred by any fine or recovery, if valid, has had *any dealings* with the estate on the faith of the same being invalid; nor where the property at the time of passing the act, was in possession of any person in respect of any estate which the fine or recovery, if valid, would have barred; nor does it extend to

(e) S. 5.

(f) S. 7.

(g) S. 8; see s. 9, saving the operation of the act in certain cases; *Davies v. D'Arcy*, 3 Ir. L. R. 617, *et qu.*; *In re Da-**vies*, 4 Ir. Ch. R. 87; Sugd. Stat. 187; *Wickens v. Windus*, 9 C. B. 711.(h) *Lockington's case*, 1 Bing. N. C. 355; *Totton's case*, 5 Bing. N. C. 626.

(i) S. 10.

(k) S. 11.

any fine or recovery which, before the passing of the act, any court of competent jurisdiction had refused to amend, nor are pending proceedings for impeaching any fine or recovery affected, but a special provision is made for such cases.^(l) Subject to these savings, all recoveries are now valid, although there was only an equitable tenant to the *præcipe*, and the estate tail was a legal one. These are excellent provisions, and they have operated favorably upon titles.

2. By this act every tenant of an estate tail not barred, and although turned to a right,^(m) and whether in possession, remainder, contingency, or otherwise, has power over the fee absolute, subject only to estates prior to the estate tail.⁽ⁿ⁾ But this power is not extended to tenants in tail who are by statute restrained from barring their estates tail, or to tenants in tail after possibility of issue extinct.^(o) A voidable estate, whenever created by a tenant in tail in favor of a purchaser for value, will be confirmed by any subsequent assurance by him under the act (except certain leases), unless such disposition be made to a purchaser for value who has not *express* notice of the voidable estate.^(p) A purchaser can ascertain whether a fine or recovery has been levied or suffered, or a statute deed executed or enrolled, and he will not be bound by voidable estates of which he had not express notice. The 11 H. 7, c. 20, is repealed as to future settlements, but women entitled to estates tail *ex provisione viri* under settlements existing when the act passed cannot exercise a power over the entail without the assent now required by law.^(q) Due provision is made for the disposition of money to be produced by the sale of other lands, where it is to be laid out in lands, of which a man would be tenant in tail.^(r)

3. As the old tenant to the *præcipe* could not be preserved under the new plan, the act creates a protector of every settlement, whose concurrence is required in barring estates tail in re-

(l) S. 12.

(m) S. 1.

(n) S. 15; see s. 19, 39; Doe v. Lord Scarborough, 3 Ad. & El. 43, 897.

(o) S. 18; Duke of Grafton v. L. & B. Ry. Co. 5 Bing. N. C. 27.

(p) S. 38; see s. 21, as to the effect of

partial dispositions; s. 30, as to a base fee being enlarged *ipso facto*, where it and the remainder in fee are united.

(q) Sect. 17.

(r) Sect. 71. In the matter of Smythe, 3 Myl. & Ke. 249; Sugd. Stat. 229.

mainder, in order *to preserve, under certain modifications, the control of the tenant for life over the remainder-man.(s)(1)

4. A purchaser of a life estate in possession, and of a remainder or reversion after an intermediate estate tail, should keep in view the singular operation of the act; for if tenant for life or for years determinable on his life, with remainder to his sons in tail, with remainder or reversion to himself in fee, were to sell and convey the life interest and the remainder or reversion, he himself would still be the protector, and could at any time during the continuance of the life interest consent to a statute deed of disposition by the tenant in tail which would bar the remainder or reversion: or in other words, he might in substance resell the remainder or reversion to the tenant in tail, for he may make what bargain he can with the tenant in tail, and a covenant by him with the purchaser *not* to exercise his power of consenting would be simply void.(t)

5. The act preserves to tenants in tail in remainder the like powers which they before enjoyed: they could by a fine with proclamations bar the estate tail and obtain a base fee without the concurrence of the immediate freeholder, in whose place the protector now stands, and they may now do so by a statute deed without the consent of the protector.(u)

6. The power of the protector to consent is made absolute; his discretion is absolute and uncontrollable even by a court of equity, and any agreement entered into by him to withhold his consent is void. Nor can his giving his consent be deemed a breach of trust, for he is not to be deemed a trustee of the power(x) Nor are the rules of equity in relation to dealings and transactions between a donee of a power and any object of the power in whose favor the same may be exercised, to apply to this

(s) S. 22, 23, 24, 25, 26, 27, 28, 30, 32; man, 2 My. & Cr. 112; In the matter of see s. 33, 48, 49, as to power of court of Graydon, 1 Mac. & G. 655; *In re Starkie*, chancery and of L. C.; 11 Sim. 528; 3 My. & Ke. 247.

In re Wainewright, 11 Sim. 352, 1 Phil. (t) See 593, 594, of the 11th edit.

258; *Grant v. Yea*, 3 My. & Ke. 245; (u) S. 34; *Slater v. Dangerfield*, 15 M. *In re Blewitt*, *Ib.* 250; *In re Wood*, & W. 263.

3 My. & Cr. 266; both the latter over- (x) S. 36; 11 Sim. 527.
ruled, 6 De G., M. & G. 187; *In re New-*

(1) For the saving of the right of an existing trustee to be protector, see Sugd. Stat. 205; *Read v. Stedman*, 28 L. J. N. S. 481; *Buttenshaw v. Martin*, John. 89.

case.(y) And after a consent has been duly given, he cannot revoke it.(z) A married woman being a protector, either alone or jointly with her husband, may consent as a *feme sole*.(a) A vesting order under the trustee act of 1850, where the infant is tenant in tail in remainder, if made with the consent of the protector, will have the effect of barring the remainders over.(b)

*7. The act draws a clear distinction between dispositions by a tenant in tail *resting in contract*, which are not to be of any force at law or in equity under the act, although made by deed and for valuable consideration,(c) and interests actually created, for the tenant in tail is empowered to dispose of the lands entailed for an estate in fee simple or for any less estate.(d) But there is, as we have seen, nothing to affect contracts as such, and therefore although they will not operate to bar or bind the entail under the act, nor can equity give to them that operation, yet they may be recovered upon at law, or be made the foundation of a specific performance against the tenant in tail himself.(e) The general observations in *Davis v. Tollemache*,(f) where a specific performance of a covenant in a mortgage deed, by a tenant in tail in remainder, not enrolled, was refused, should be referred to the frame of the deed, particularly of the *habendum*, and other circumstances upon which it is not necessary to offer any opinion, and cannot be considered as denying the clear operation of a deed enrolled by a tenant in tail in remainder, whether upon a mortgage or sale of all the interest which he is capable of conveying, to bar the estate tail and bind the issue and pass a base fee, nor did the learned judge intend to decide the contrary.

8. No assurance by a tenant in tail under the act will have any operation unless it be enrolled in the court of chancery within six calendar months after its execution, which enrolment will be sufficient even where the conveyance is by bargain and sale within the statute of enrolments (27 H. 8),(g) and it must be made by deed; and if the tenant in tail is a married woman the

(y) S. 37.

(z) S. 44.

(a) S. 45.

(b) *Powel v. Matthews*, 1 Jur. N. S. 973.(c) S. 40; *Pryce v. Bury*, 2 Drew. 11.

(d) S. 15, 1.

(e) *Sup.* p. 204.

(f) 2 Jur. N. S. 1181.

(g) S. 41; see s. 74.

concurrence of her husband is necessary,^(h) and her deed is to be acknowledged by her after a separate examination.⁽ⁱ⁾

9. The protector may give his consent by the same assurance which effects the disposition, or by a separate instrument, to be executed either on, or at any time *before* the day on which the assurance shall be made; and the deed must be enrolled in the court of chancery at or *before* the time when the assurance shall be enrolled; wherever, therefore, the consent is given by a separate deed, these requisitions should be strictly complied with, and it should be executed before any party executes the other deed, and the time of execution should be noticed in the attestations. If given by a separate instrument, it is to be deemed an unqualified consent, unless the particular assurance is referred to, and his consent confined to that disposition; and as we have seen, a consent once given cannot be revoked.^(k)

* 10. In regard to both *dispositions* by tenants in tail and *consents* of protectors, the jurisdiction of equity is altogether excluded. It is immaterial whether the party is a purchaser for a valuable consideration or not; the jurisdiction is excluded in regard to the specific performance of contracts, and the supplying of defects in the execution either of the powers of disposition in tenants in tail or of the powers of consent in protectors and the want of execution of such powers; the deed must be effectual in law in order to operate; and equitable entails are placed upon the same footing with legal ones.^(l) No power which the tenant in tail had to convey without the aid of a fine or recovery is taken away, and therefore his conveyance without a compliance with the formalities of the act will still pass a base fee avoidable by the issue in tail; and this act makes any subsequent disposition within the act by the tenant in tail a confirmation of the previous voidable estate, unless as against a purchaser without express notice. And whatever a tenant in tail could have conveyed by a fine or common recovery he may now convey by a deed enrolled under the statute; so that his power of alienation is not in any instance curtailed, but it is enlarged where the estate tail has been divested or is in contingency, and all the refined distinctions between legal and equitable tenants to the

(h) S. 40.

(i) S. 79, 80.

(k) S. 42, 43, 46.

(l) S. 47.

præcipe are abolished; and provided the protector consent where his consent is required, the bar under the act will be effectual, whether the protector was seised of the legal or only of the equitable estate, and it is immaterial whether the estate tail be a legal or an equitable one.^(l)

11. The law remains wholly unchanged as to *quasi* entails in estates *pur autre vie* or in mere chattels.

12. It cannot be too strongly impressed upon purchasers, that their title will depend upon the legal validity of the dispositions under the statute: nothing can be supplied;—if the instrument, for example, be not a deed, or being a deed is not enrolled in the proper court in due time, it will be absolutely void, and equity cannot set it up. And although equity, notwithstanding the stringent clauses in the act, will still be able to compel a *seller* to make a new valid conveyance, yet that could not be enforced against the issue, nor could it be enforced against a protector. No purchaser can be deemed safe unless the deeds are properly enrolled, and he should not part with his money until that is done. Where father and son joined in barring the estate tail and creating a mortgage, the security was supported, although the deed recited that the son was tenant in tail, whilst in fact the father was tenant in tail of part.^(m)

13. Copyholds are within the act, and all the previous clauses, so far as circumstances and the different tenures will admit, are to apply to copyholds; but surrenders are to be made by legal tenants in tail, * and surrenders or deeds are to be made or executed by equitable tenants in tail.⁽ⁿ⁾ And the mode in which the protectors are to consent, by deed or not by deed, and the entry of the deed or of the consent on the court rolls are particularly pointed out.^(o) Where the consent is given by deed, such deed, either at or before the time when the surrender is made, must be executed and be produced to the lord or steward, without which the consent will be void. An acknowledgment of the production of the deed within the time limited is to be indorsed “by

(l) [Provisions are made for barring equitable estates tail in Massachusetts by Gen. Sts. c. 89, §§ 6, 7.]

(m) *Evans v. Jones*, 1 Kay, 29.

(n) S. 50 & 53; see s. 67, as to disposi-

tions of equitable estates; and as to customary freeholds, see *Regina v. Ingleton*, 8 Dowl. Cas. 693.

(o) S. 51, 52, 53; 4 & 5 Vict. c. 35, s.

89, as to entries on court roll.

writing under the hand of the lord, steward, or deputy steward," and the deed with the indorsement, is to be entered on the court rolls; (p) and the lord or steward is to indorse on the deed a memorandum, signed by him, certifying the entry on the rolls. Where the consent is not by deed, it is to be given by the protector to the person taking the surrender, or if the surrender is made out of court, it must be stated in the memorandum of it that such consent had been given, and the memorandum is to be signed by the protector, and the memorandum with the consent is to be entered on the court rolls; (q) and if the surrender be made in court, the lord or steward is to cause an entry of the surrender and consent to be made on the rolls. A disentailing deed of copyholds must be entered on the court rolls within six calendar months after its execution, for a like deed of freeholds must be enrolled in chancery within the like period, and this provision by the act is extended as to time to copyholds.(r)(1)

14. Equitable tenant in tail of copyholds may bar the entail by deed just as in freeholds, and the deed is to be entered on the court rolls; and if a protector consent by a distinct deed the consent is void, unless the deed be executed by the protector, either on or at some time before the day on which the deed of disposition is executed by the equitable tenant in tail, and the deed of consent is to be entered on the rolls, and an indorsement is to be made on the deed by the lord or steward, signed by him, of the entry on the rolls.(s) But to this provision there is added a proviso, that every such deed of disposition shall be void against any person claiming the lands for valuable consideration under any subsequent assurance duly entered on the court rolls, unless the deed of disposition by the equitable tenant in tail be entered on the court rolls before the subsequent *assurance is entered.(t) In giving this priority to a subsequent purchaser the act is silent about notice, and having regard to the general frame and objects of the statute, and the provisions in it respecting

(p) S. 51.

(s) 3 & 4 W. 4, c. 74, s. 53.

(q) S. 52.

(t) S. 53.

(r) *Honywood v. Forster*, 30 Beav. 1.

(1) And now an order may be made by the court of bankruptcy for the vesting the copyhold land of a bankrupt in such person and in such manner as the court shall see fit, so as to save the expense of two conveyances; 24 & 25 Vict. c. 134, s. 114.

notice, it is not improbable that notice will not be held to supply in equity the want of an entry on the court rolls. The operation of the deed depends altogether on the statute, and in this case it is avoided by express enactment. A purchaser, therefore, from an equitable tenant in tail of copyholds should not part with his money until such an entry is duly made. But the enrolment required of deeds as to freeholds does not apply to deeds or surrenders of copyholds.(u)

15. The commissioner under any fiat in bankruptcy against an actual tenant in tail of lands of any tenure, is enabled by deed to dispose of the estate to a purchaser for valuable consideration, just as the bankrupt could have done, according as the protector, if there be one, consents or not.(x) And a like power is given to the commissioner over a base fee.(y) (1)

16. And as regards the operation of a consent by the protector upon a disposition by the commissioner, he, the commissioner,—whether he shall have made a prior disposition without the consent of such protector or not, or whether a prior sale or conveyance shall have been made or not under the two former statutes relating to bankruptcy, or any future statute,—is placed in the same situation as the bankrupt himself would have occupied, and the previous directions as to enrolment, &c., apply equally to this case.(z) The deed, if not relating to copyholds, will be void if not enrolled in the court of chancery within six calendar months after its execution, and deeds of disposition and consent as to copyholds are to be entered on the court rolls as before directed.(a)

17. There are two important provisions relating to a purchaser obtaining by a disposition from the commissioner under this act a base fee only, for want of a consent by the protector, or obtaining a base fee by a sale and conveyance under the bankrupt acts whilst there is a protector; in either case, if at any time afterwards, *during the continuance of the base fee*, there shall

(u) S. 54; see 30 Beav. 12, 13.

(z) S. 58.

(x) S. 56.

(a) S. 59.

(y) S. 57.

(1) As to copyholds, see pl. 13, *supra*. All the sections, 56 to 69, both inclusive, are ingrafted into the bankruptcy act of 1849, 12 & 13 Vict. c. 106, s. 208, which is not repealed by the 24 & 25 Vict. c. 134; see sched. G. Sugd. Stat. 228; and as to Ireland, see ch. 2, s. 9, p. 240, of the same book; and also p. 228.

cease to be a protector, then the base fee will, without any further act, become enlarged in the hands of the purchaser into the same estate into * which the same could have been enlarged under the act if, in the first case, there had been no protector when the disposition was made; and if, in the last case, at the time of the adjudication, there had been no such protector, and the commissioner had disposed of the lands under the act.(b)

18. And where a tenant in tail or of a base fee has created, or shall create, a voidable estate in favor of a purchaser for valuable consideration, any disposition under the act by the commissioner (whether he has made under the act a previous disposition, or whether a prior sale or conveyance shall have been made or not under the bankrupt acts), according as the protector consents or not, is to have the effect of confirming such voidable estate. And a subsequent failure of a protector during the continuance of the base fee, where that only passes, will enlarge it. But this last provision is clogged with the proviso, that if the disposition by the commissioner shall be made to a purchaser for valuable consideration, who shall not have *express notice* of the voidable estate, then the voidable estate shall not be confirmed against such purchaser.(c)

19. The acts of the bankrupt tenant in tail are avoided against any disposition under the act to the same extent as if he were tenant in fee; (d) but, subject to all the powers and the estate of the assignees, the bankrupt's own power of disposition is to remain.(e)

20. Where a bankrupt non-trader is tenant for life under a settlement or will, in remainder expectant upon the deaths of any previous tenant or tenants for life with any remainders over to the bankrupt's issue, or any of them, as purchasers, the life estate of the bankrupt is not to be sold before it falls into possession without an express direction of the court.(f)

21. The act enables every married woman, not being tenant in tail, by deed to dispose of lands of any tenure, and money subject to be invested in lands, and also to dispose of, release, sur-

(b) S. 60, 61; see Sugd. Stat. 228; *Jervis v. Tayleur*, 5 B. & Ald. 557.

(c) S. 62.

(d) S. 63.

(e) S. 64; as to the commissioners' power after the bankrupt's death, s. 65.

(f) 24 & 25 Vict. c. 134, s. 115.

render, or extinguish any estate which she alone, or she and her husband in her right, may have in lands of any tenure, or in any such money; and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any lands of any tenure, or in any such money, as effectually as if she were a *feme sole*; but her husband must concur in the deed, and the deed must be acknowledged in the manner required by the act,^(g) and the provision * is not to extend to copyholds in cases where the power is not required; ^(h) but it includes a power to married women and their husbands, who were married before the 1st of January, 1834, to bar dower.⁽ⁱ⁾

22. The act does not interfere with any power in a married woman, unless she suspends or extinguishes it by a disposition under the act.^(k) But every deed executed by her, except in the mere character of a protector, is to be acknowledged by her,^(l) and she is to be separately examined,^(m) for which purpose necessary machinery is provided by the acts ⁽ⁿ⁾

23. Surrenders by husband and wife, by which she is separately examined, of equitable estates in copyholds, are made as binding upon the woman as surrenders of legal estates, and all former surrenders of the like kind are thereby rendered valid.^(o) And the court of common pleas is authorized to dispense with the husband's concurrence in cases of lunacy, separation, &c., but without prejudice to his rights; ^(p) and the provision has been extended to the husband's infancy; ^(q) but although the

(g) *Banks v. Ollerton*, 10 Ex. 168; *Field v. Moore*, 19 Beav. 176, 24 L. J. Ch. 161; *In re Allerton*, 15 C. B. 796; *In re London Dock Co.* 20 Beav. 490; 17 & 18 Vict. c. 75.

(h) S. 77; see 5 Bing. N. C. 226; *Audsley v. Horn*, 1 Fos. & Fin. 135; *In re Ollerton*, 15 C. B. 796; *Hobby v. Allen*, 20 L. J. 199; Sugd. Stat. 232; *Briggs v. Chamberlain*, 11 Hare, 69; *Tuer v. Turner*, 20 Beav. 160; *Crofts v. Middleton*, 2 K. & J. 194, 8 De G., M. & G. 192; 8 & 9 Vict. c. 106, s. 6.

(i) Sugd. on Stat. (2d edit.) 229, 234.

(k) 3 & 4 W. 4, c. 74; S. 78.

(l) S. 79.

(m) S. 80.

(n) S. 81-89; In ch. 2, s. 7, of Sugd. Stat. pl. 6, p. 232, is out of its proper place. Section 38 there referred to, is that section in 19 & 20 Vict. c. 120 (settled estates act of 1856).

(o) S. 90.

(p) S. 91; *Ex parte Ann Shirley*, 5 Bing. N. C. 226; *In re Mirfin*, 4 Man. & Gr. 635; *In re Woodcock*, 1 C. B. 437; *In re Perrin*, 14 C. B. 420; *Ex parte Anne Trenery*, 1 C. B. N. S. 187; *In re Anne Kelsey*, 16 C. B. 197; *In re Ann Yarnall*, 17 C. B. 180; *In re Anderson*, 2 C. B. N. S. 118. For the form of affidavit, see *Ex parte Fish*, 9 C. B. N. S. 715.

(q) *In re Haigh*, 26 L. J. N. S. 209.

estate is settled to the wife's separate use for life, with remainders over for her benefit, yet if there is a power of sale to be exercised with their joint consent, the case does not fall within the statute.(*r*)

24. It should be kept in view, that a statute deed by a married woman, as tenant in tail or protector of a settlement, must be enrolled according to the directions of the act, and where it operates as a conveyance of her interests, it must be acknowledged by her, and she must be separately examined whether she is tenant in tail or not.

25. A later act,(*s*) which enables the disposition by deed of contingent interests, possibilities coupled with an interest, and rights of entry, in lands, &c., of *any tenure*, provides that no such disposition shall, by force only of that act, defeat or enlarge an estate tail, and * that every such disposition by a married woman shall be made conformably to the provisions just referred to in the principal statute; and it is provided (*t*) that after the 1st October, 1845, an estate or interest in hereditaments of any tenure in England may be disclaimed by a married woman by deed, such disclaimer to be made conformably to the above mentioned provisions. A married woman under the act has, it was ruled, a power of disposition only and not a power to contract,(*u*) but upon an appeal it was held that a contingent remainder in a married woman might be transferred at law by her with her husband under the statute, and that a married woman was able to contract in equity, not so as to render her liable in damages, but so as to bind her interest in lands equitably if not legally.(*x*)

26. Every deed relating to lands required to be enrolled in chancery, is, when enrolled, to operate as if enrolment had not been required, with this important exception, that every such deed will be void against any person claiming the lands or money, under any subsequent deed duly enrolled under the act, if such subsequent deed shall be first enrolled.(*y*) The act is silent in this provision as to notice. The conflicting rights of pur-

(*r*) *In re Mary Eden*, 5 C. B. 232.

194, 8 De G., M. & G. 192; and observe the dates.

(*s*) 8 & 9 Vict. c. 106, s. 6; 7 & 8 Vict. c. 76, s. 5.

(*x*) *Supra*, p. 206-208.

(*t*) S. 7, 8 & 9 Vict. c. 106.

(*y*) S. 74; *Cattell v. Corral*, 4 Yo. &

(*u*) See *Crofts v. Middleton*, 2 K. & J. Col. 228; see Sugd. Stat. 237.

chasers in such a case seem to depend upon another provision, (z) by which a voidable estate, whenever created by a tenant in tail in favor of a purchaser for valuable consideration, will be confirmed by a subsequent valid disposition under the act, unless that disposition be in favor of a purchaser for valuable consideration, who bought *without express notice of the voidable estate*. Upon the true construction of the act, it seems that where one purchaser claims under a prior, but as far as the act is concerned an ineffectual disposition, and another claims under a later but effectual disposition under the act, the former will be preferred to the latter if the latter bought with express notice of the other's right, unless the seventy-fourth section is not to be controlled or explained by the thirty-eighth; and if not, then the particular case of want of enrolment does not fall within the thirty-eighth section, but is altogether dependent on the seventy-fourth.

* SECTION III.

OF A TITLE BY NON-CLAIM. (a¹)

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|---|---|
| <ol style="list-style-type: none"> 1. Right extinguished. 2. Twenty years a bar. 3. Meaning of rent in second section. 4. Quarries, &c. 5. Mere possession sufficient. 6. Rights of the crown and the Duchy of Cornwall. 7. When time accrues. 8. Where party has been in possession. — Where a deceased person was last in possession. — Where a grantor was last in possession. — Trustee of term. 9. Where any payment has been made to a mortgagee. 10. Summary. — Twenty years a bar, although case not within the instances stated. — Rent newly created by will. | <ol style="list-style-type: none"> 11. Reversionary estate, and no possession. — Executory devises. — Forfeiture, or breach of condition. — Remainder-man may wait till possession fall. — Concurrent rights. 12. Administrator. 13. Tenant at will, possession by. 14. Tenant from year to year without lease in writing, possession by. 15. Tenant under lease at a rent of 20<i>l.</i>, or more, possession by. 16. Possession by coparcener, and the like, or by heir. 17. Acknowledgment of title in writing. 18. Savings. — Forty years the full period. 19. Imperfect conveyance by husband and wife. |
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(z) S. 38.

(a¹) [A synopsis of the limitations of real actions in the several States of the Union, together with the time allowed for

disabilities, will be found in 2 Cruise Dig. by Mr. Greenleaf, at the end of vol. 3, and close of title, 31, Prescription; Angell Limitations (4th ed.), § 333 *et seq.*]

20. Forty years not a perfect bar.
21. Bar of tenant in tail bars remainder. — Where time has run against him. — Where he dies before time is out. — Possession under an imperfect assurance by him. — Does not operate retrospectively. — Base fees, how affected. — Voidable fees.
22. Bars in equity same period as at law: express trusts: concealed frauds.
23. Charities.
24. Charge not a trust.
25. Filing a bill. — Appointment of receiver. — Acquiescence, &c.
26. Mortgagor out of possession. — Acknowledgment.
27. Where mortgagee is tenant for life.
28. Time for spiritual and eleemosynary corporations.
29. Advowsons. — One hundred years full period.
30. Twenty years a bar of money secured upon land, &c., or legacy. — Vendor's lien. — Judgment creditor barred.
31. Legacy become a trust. — Judgment creditor.
32. } Dower, rent, or interest.
33. }
34. Judgments.
35. Interest.
36. Moduses or exemptions, thirty years: sixty years. — Corporations sole.
37. Decrees. — What time excluded.
38. Disabilities.
39. Tithe commutation act.
40. Lights, twenty years.
41. Rights of common, &c., thirty years: sixty years.
42. Ways, watercourses, twenty years: forty years.
43. Time, how to be computed.
44. Nature of enjoyment.
45. Tenancy for life.
46. Presumption inadmissible.
47. Title to a purchaser.

1. By the new statute, when the remedy is barred by time, the right and title of the person whose remedy is taken away is extinguished, (a) and there can be no remitter by a reëntry after the * twenty years. (b) This is a great improvement, and very much assists titles depending upon non-claim. The remedy is now by ejectment, (c) and the time which has run *before* the passing of the act will count as part of the period allowed by the new law, so that the time will continue to run. The proceedings in ejectment are now regulated by the 15 & 16 Vict. c. 76. (d) Possession now will gain a title, although not adverse in the sense of that expression under the old law; (e) it is difficult to find a more fit expression for possession operating as a bar under the

(a) 3 & 4 W. 4, c. 27, s. 34; Scott v. Nixon, 3 Dru. & War. 388; Doe v. Carter, 13 Q. B. 945; [Burroughs v. M'Creight, 1 J. & L. 290; Arrington v. Liscom, 34 Cal. 365;] see Sugd. Stat. (2d edit.) ch. 1.

(b) Brassington v. Llewellyn, 27 L. J. N. S. 297, Ex.; 1 Fos. & Fin. 27.

(c) S. 36.

(d) S. 168-221; 16 & 17 Vict. c. 113; Ir. s. 194-227; 17 & 18 Vict. c. 125, s. 16; 19 & 20 Vict. c. 102, s. 19; see 23 & 24 Vict. c. 126.

(e) Nepean v. Doe, 2 M. & W. 894; Culley v. Taylerson, 9 Per. & Da. 539. [See Wheeler v. Winn, 53 Penn. St. 122; Rifener v. Bowman, 53 Penn. St. 313; Young v. Herdie, 55 Penn. St. 172; Joiner v. Borders, 32 Geo. 239; Hudgins v. Crow, 32 Geo. 367; Snoddy v. Kreutch, 3 Head (Tenn.), 301; possession under a contract for a purchase. Dean v. Brown, 23 Md. 11.]

statute. Where the right is barred by the statute, a person in possession may maintain it whether with or without title.(f)

2. The period limited for making an entry or distress, or bringing an action for land (which includes all corporeal heredita-

(f) *Holmes v. Newland*, 11 Ad. & El. 44; 3 Ad. & El. N. S. 679. [It has been said that the effect of the act is to make a parliamentary conveyance of the land to the person in possession, after the statutory period has elapsed; per Parke B. in *Jakes v. Sumner*, 14 M. & W. 42, and see Lord St. Leonards, in *Incorporated Society v. Richards*, 1 Dru. & W. 289; but though it is true that the possessory owner, after the statutory limit has been passed, is placed by the act in a position analogous to that which he would have occupied, if the fee simple had been absolutely conveyed to him, yet his title under the act is acquired solely by the extinction of the right of the prior rightful owner, not by any statutory transfer of the estate. If the statute operated as a sort of involuntary alienation of the estate of the rightful owner, the adverse possessor would take it subject to the subsisting charges; and wherever it was in settlement, his interest therein would be constantly varying according to the successive limitations of the settlement; but this is clearly not the operation of the statute. See 1 Hayes Conv. 268, and an article xi. Jur. N. S. p. 151. A person who is in possession, but who has not acquired an indefeasible title under the statute, has, as against every one but the rightful owner, an interest which may be inherited, devised, or conveyed; *Doe v. Jauncey*, 8 C. & P. 99, 102; *Asher v. Whitlock*, L. R. 1 Q. B. 1, 3; and though his possession may have lasted only for a year, he may without further proof of title, maintain ejectment against a person who comes and turns him out; *Doe v. Dyeball*, Mood. & M. 346; in other words, he may as against *strangers* defend his right of possession until, by force of the statute, it has ripened into a right of property. It has

been held, that in order that possession may confer a valid title upon a particular individual, it must have been either by the same person or by several persons claiming one from another; see *Hawksbee v. Hawksbee*, 23 L. J. Ch. 521; 11 Hare, 230; *Holmes v. Newlands*, 11 Ad. & El. 44; *Sims v. Eastland*, 3 Head (Tenn.), 368; *Newlands v. Holmes*, 3 Q. B. 67; *e. g.* that if twenty persons, unconnected with each other, had been in possession, each for one year consecutively, for twenty years, it would be impossible to say that any one of these twenty persons had acquired a title under the act; *Doe d. Carter v. Barnard*, 13 Q. B. 945; see judgment, *Dixon v. Gayfere*, 17 Beav. 421; and in a case of this description the master of the rolls decreed possession to the *last* occupier, on the ground that, at law, he might have maintained his possession against all but the true owner, who was barred by lapse of time. *Dixon v. Gayfere*, 17 Beav. 421. But in a recent case (*Asher v. Whitlock*, L. R. 1 Q. B. 1, 4), this decision has been questioned; and the sounder view appears to be, that when the right of the original owner has become extinguished, the first adverse possessor may, until his own right is in like manner lost, maintain ejectment against a subsequent possessor by whom he has been expelled; or, in other words, the actual occupier at the time of the extinction of the original owner's right, does not acquire an indefeasible statutory title, until the rights of all former adverse possessors (if any) have in like manner been extinguished. 1 Dart V. & P. (4th Eng. ed.) 370, 371. A similar point was discussed in *Peele v. Chever*, 8 Allen, 89; and the decision of the court is in harmony with the conclusion above arrived at.]

ments, of whatever tenure, and also tithes not belonging to a spiritual or eleemosynary corporation sole) or rent (which extends to heriots,^(g) and to services and suits for which a distress may be made), and to annuities and periodical sums charged on land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole,^(h) is twenty years from the time the right first accrued. *Tithes* in this provision does not mean tithes as between tithe-owner and occupier, but applies to those cases where there are two persons, each claiming an adverse estate in the tithes; ⁽ⁱ⁾ nor does *rent* mean rent reserved by lease, but rentcharge.^(k) The statute speaks of receiving the profits of land which includes the receipt of rent.^(l) (1) And it seems that time will extinguish a rent as well as an estate in the land itself.^(m) And where the statute has operated to extinguish the right, the title under it may be forced on a purchaser.⁽ⁿ⁾

* 3. "Rent" in the second section does not refer to rents received by common leases for years; and mere nonpayment of rent to the landlord is no bar, although the forty-second section limits the period for which a distress for rent may be made. And where no third person has got into wrongful receipt of the rents, the landlord, notwithstanding that the rent has been withheld, may recover the land at the expiration of the lease. The landlord may preserve his right by distress, or by otherwise obtaining his rent within twenty years after the first wrongful receipt of it by an adverse claimant.^(o) But if under a power

(g) See Sugd. Stat. 17.

(h) S. 2, 6; 3 & 4 W. 4, c. 27; the saving of writs of dower and *quare impedit* is repealed, and an action by writ of summons substituted by 23 & 24 Vict. c. 126, s. 26; Sugd. Stat. p. 8; which requires a reference to this statute.

(i) Nepean v. Doe, 2 M. & W. 894; Culley v. Taylerson, 3 Per. & Da. 539; Dean & Chap. of Ely v. Cash, 15 M. & W. 617; Bunbury v. Fuller, 9 Ex. 128.

(k) Grant v. Ellis, 9 M. & W. 113;

Sheil v. Incor. Soc. 10 Ir. E. R. 411; Hayes v. Woodley, 3 Ir. C. R. 142; Doe v. Angell, 9 Ad. & El. N. S. 355; *In re* Turner, 11 Ir. Ch. Rep. 304; Sugd. Stat. 35.

(l) S. 35; Doe v. Gardiner, 12 C. B. 319.

(m) Hanks v. Palling, 6 E. & B. 659; Sugd. Stat. 8.

(n) Scott v. Nixon, 3 Dru. & War. 388; Lethbridge v. Kirkman, 25 L. J. 89, Q. B.

(o) Grant v. Ellis, 9 M. & W. 113; Doe

(1) As to the profits of mines, see *Denys v. Shuckburgh*, 4 Yo. & Col. 42; *Clegg v. Clegg*, 8 Jur. N. S. 92; and as to time as a bar to a right in them, see *M'Donnell v. M'Kinty*, 10 Ir. L. R. 514; *Keyse v. Powell*, 2 E. & B. 132, 645; *Smith v. Lloyd*, 9 Ex. 562; *Doe v. Abp. of York*, 14 Ad. & El. N. S. 81; *Tottenham v. Byrne*, 12 Ir. C. L. R. 376; Sugd. Stat. 33.

of reëntury for nonpayment of rent he neglect to do so for twenty years he cannot afterwards reënter during the lease, although he may recover possession at the end of the term.(p)

4. Quarries and limestone are treated as land,(q) but turnpike tolls are not within the act.(r)

5. Mere possession now is sufficient to bar the remedy under this section, if the claimant's right of entry accrued above twenty years before the ejectment,(s) and this, although the claimant is a mortgagee only, and the right to recover the money falls within a later section.(t) But it has been said that the statute could never be so construed that a person claiming a life estate under a will should enter, and then say that such possession was unlawful [the estate not passing by the will], so as to give to his heir a right against the remainder-man.(u)

6. Time, in like manner, runs against the crown and the Duchy of Cornwall under other statutes,(x) so that adverse possession for sixty years is a good defence both against the crown and the duchy; and a title thus acquired may be forced upon a purchaser.(y)

7. Where the claimant is the person to whom the right first accrued, time runs from the period when his right first accrued; where the right first accrued to some person through whom he claims, time will run from the period when the right of such person first accrued, and this includes title as heir, issue in tail, tenant by the curtesy or in dower, successor, special or general occupant, executor, * administrator, legatee, husband, assignee, appointee, devisee, or otherwise, or by escheat.(z)

- v. Oxenham, 12 C. B. 319; De Beauvoir v. Owen, Exch. Rep. 179; [16 M. & W. 547; 5 Exch. 166;] Crosbie v. Sugrue, 9 Ir. L. R. 17; Hicks v. Sallitt, 3 De G., M. & G. 782; *In re* Turner, 11 Ir. Ch. Rep. 304; Sugd. Stat. 36, 45.
- (p) Doe v. Bingham, 3 Ir. L. Rep. 456; Sugd. Stat. 43, n.
- (q) 3 Ir. L. Rep. 521.
- (r) Mellish v. Brooks, 3 Beav. 22.
- (s) 11 Ad. & El. 1015.
- (t) Doe v. Williams, 5 Ad. & El. 291; Wrixon v. Vize, 3 Dru. & War. 104, 121; sec. 40 of Stat.; Doe v. Lightfoot, 8 M. & W. 553; Humble v. Humble, 24 Beav. 535; Sugd. Stat. 24.
- (u) Anstee v. Nelms, 1 H. & N. 225.
- (x) 9 Geo. 3, c. 16, Eng.; 48 Geo. 3, c. 47, Ir.; Att. Gen. v. Maxwell, 8 Price, 76; Att. Gen. v. Lord Eardley, *ib.* 39; Tuthill v. Rogers, 1 J. & L. 36; Doe v. Abp. of York, 14 Q. B. 81; Manning v. Phelps, 10 Ex. 59; 7 & 8 Vict. c. 105; 23 & 24 Vict. c. 53, and c. 105; 24 & 25 Vict. c. 62; see Sugd. Stat. 9; *supra*, ch. 10, s. 3, pl. 12.
- (y) Tuthill v. Rogers, 1 J. & L. 36.
- (z) S. 1.

8. Where there has been possession or receipt of profits or rent by the claimant or the person through whom he claims, the right *first accrues* when the possession or receipt was discontinued, or the last profits or rent received, or from the death of the last person in possession or receipt, and where there has been no possession or receipt under a conveyance of the possession, the right accrues from the time the grantee became entitled to possession under the instrument.(a) And although this last provision is not specially pointed to the case of trustee and *cestui que trust*, yet it has been held to apply to a term of years assigned to a trustee to attend the inheritance, where, of course, the trustee is not in possession; so that the twenty years ran from the time when he became entitled to the possession.(b) This, however, has not been followed, and it has been held at law that in the case of an attendant term, the purchaser, the *cestui que trust* entering into possession, was at law tenant at will of the trustee, and that the case fell within the second section, and that no right of entry accrued till the determination of the tenancy at will, and that the case did not fall within the provision in the third section, to which our attention has just been called (c) And in a case in equity where portions were secured by a term of years, it was held that the term was not barred, and that the portions were raisable, although more than twenty years had elapsed after a present right to receive them accrued; in such a case between trustee and *cestui que trust* the statute has no application,(d) and of course the same rule applies to an annuity secured by a trust term, and it is immaterial whether the trust is created by deed or will, or whether the term carries the legal or only the equitable estate.(e) But a *cestui que trust*, although for a limited interest, not in possession, but in law acting as bailiff or agent of the trustees, who allowed him to act as owner,

(a) S. 3.

(b) Doe v. Phillips, 10 Q. B. 130; there had been no demand of possession; s. 7.

(c) Garrard v. Tuck, 8 C. B. 231; 13 Jur. 871; Sugd. Stat. 39.

(d) Young v. Ld. Waterpark, 13 Sim. 204; 10 Jur. 1; Petre v. Petre, 1 Drew. 371; Cox v. Dolman, 2 De G., M. & G. 542; Lewis v. Duncombe, 29 Beav. 175;

In re Wyse, 4 Ir. C. R. 297; Ld. Mansfield v. Ogle, 4 De G. & J. 38; Snow v. Booth, 2 K. & J. 132; 2 Jur. N. S. 244; Smith v. Smith, 5 Ir. C. R. 88; Burrowes v. Gore, 6 H. L. Cas. 907; Gyles v. Gyles, 9 Ir. Ch. R. 135; Shaw v. Johnson, 7 Jur. N. S. 1005.

(e) Lewis v. Duncombe, 29 Beav. 175.

cannot be deemed to be à tenant at will of his trustees, so as to save time; and the possession of a third person, although obtained from the *cestui que trust*, may by possession for twenty years without payment of rent or acknowledgment, give to him a title against both the trustees and the *cestui que trust*.(f)

*9. And now a mortgagee may recover within twenty years after the last payment of any part of the principal money or interest; but for this a further enactment was deemed necessary.(g) And it seems that a purchaser of part of an estate in mortgage, although he had no notice of it, may be bound by the mortgage after any length of possession undisturbed, if the owner of the rest of the estate keep the mortgage alive by payment of any part of the principal or interest. And before the statute operates in favor of a possession the real owner may by a mortgage and payment keeping it alive prevent the further running of time against him or the mortgagee.(h)

10. The provisions, then, as to cases of estates in possession are these: where the party in possession is dispossessed, or discontinues such possession, the time runs from such dispossession or discontinuance, whether the claimant claims through some other person or not. Where the claimant derives his claim from another who is dead, and was in possession at his death, and was the last in possession, the time runs from his death; and where the claim is originally or derivatively through an instrument *inter vivos*, where the possession was in the grantor, but ended with him, the time runs from the period when the claimant, or the person under whom he claims, became entitled to the possession. These enactments, which are in the third section, pointing out when in the given cases the right shall be deemed to have first accrued, do not exclude (i) any case which is not provided for by this third section, altogether from the operation of the second section. A rent or annuity created by a will, falls therefore within the second section, and is not excepted out of it by the

(f) *Melling v. Leake*, 16 C. B. 652; 1 Jur. N. S. 758. Massey, *Ib.* 373; *In re Muskerri*, 9 Ir. Ch. Rep. 94; Sugd. Stat. p. 29; Forsyth v.

(g) 1 Vict. c. 28; *Doe v. Williams*, 5 Bristowe, 8 Exch. 716; *Morris v. Herbert*, Ad. & El. 291; 3 Dru. & War. 118, 119; 9 Ir. Ch. Rep. 327.

[*post*, 486, § 26, note (g¹).]

(i) *James v. Salter*, 2 Bing. N. C. 505, 515; 3 Bing. N. C. 344; Sugd. Stat. 19.

third section,(j) and consequently the twenty years would run from the period when the right to distrain for it first accrued. But although the grantor of a rent or annuity remain in possession and receive the rents for twenty years without any actual acknowledgment of the grantee's title, yet payment of the charge itself will save the right to it.(k)

11. As to reversionary or other future estates or interests in respect of which there has been neither possession nor receipt of rents, the right first accrues when they become estates in possession,(l) and *the words comprehend all executory devises.(m) Where the title is by reason of any forfeiture or breach of condition, the title accrues upon the forfeiture or breach.(n) But a remainder-man or reversioner is allowed a new right in respect of such forfeiture or breach from the time his interest falls into possession,(o) and a reversioner is entitled to claim from the time his reversion falls into possession, and his possession *before* the creation of the particular estate will not prevent his claim.(p) But if a person in possession is barred by the lapse of time, he is equally barred as to any other interest which at any time during the same period he had, unless some person entitled after the estate in possession shall have recovered in the mean time.(q) These two last provisions are contained in the fifth and twentieth sections, and it has been held that upon their true construction the provision in s. 5 applies to those cases only *where another person than the owner of the particular estate is the reversioner.*(r) Yet where

(j) *James v. Salter*, 3 Bing. N. C. 344, 553-555; *Doe v. Phillips*, 10 Ad. & El. 130; *Doe v. Moore*, 9 Ad. & El. 555; *Langton v. Langton*, 18 Jur. 928.

(k) *Searle v. Colt*, 1 Yo. & Col. C. C. 36; *Doe v. Beckett*, 4 Ad. & El. N. S. 601; *M'Donnell v. M'Keaty*, 10 Ir. L. Rep. 514; *Francis v. Grover*, 5 Hare, 39; *In re Ashwell's Will*, Johns. 112; see Sugd. Stat. 32.

(l) S. 3; *Doe v. Edmonds*, 6 M. & W. 295; [*Ford v. Flint*, 40 Vt. 382; *post*, 493, note (h).]

(m) 3 Bing. N. C. 554.

(n) S. 3. [See 4 Kent (11th ed.), 188, 189.]

(o) S. 4.

(p) S. 5.

(q) S. 20. [According to the principle of the decision in *Wells v. Prince*, 9 Mass. 508, though a remainder-man should have acquired a right of entry in the lifetime of the devisee for life, yet he was not bound to avail himself of it, and might enter when his second right accrued by the death of the tenant for life. See 4 Kent (11th ed.), 189, note; *Jackson v. Schoonmaker*, 4 John. 390, 402; *Jackson v. Sellick*, 8 John. 262; *Jackson v. Johnson*, 5 Cowen, 74; *Stevens v. Winship*, 1 Pick. 327; *Wallingford v. Hearl*, 15 Mass. 471.]

(r) *Doe v. Mouldsdale*, 16 M. & W. 689.

husband and wife were entitled for their lives, with remainder to the husband in fee, who became a bankrupt and absconded, and the wife occupied for her life — more than twenty years — the assignees recovered in ejectment after her death, for the husband's reversion was a future estate within s. 3, and if it fell within s. 20, the wife's possession was a sufficient recovery to save the right of the assignees within the proviso.(s)

12. Time runs against an administrator from the testator's death.(t)

13. Where there is a tenant at will, the right of the person subject thereto accrues at the determination of the tenancy or at the expiration of one year after the commencement of the tenancy, when it is to be deemed to have determined, but a mortgagor or *cestui que trust* is not to be deemed a tenant at will within this clause to his mortgagee or trustee.(u) This has been supposed to put an end to a continuous tenancy at will, although there may be a new one every year,(x) and this section provides a bar where there has been no express act done to determine the tenancy at will up to the time of passing the statute. The provision is a general and continuing one, and is not confined to cases existing at the time the act passed, although it applies to them; (y) but a twenty years' possession by a tenant at will, who died before the act passed, did not vest the * fee in him, although it would have been different had he survived the statute and continued in possession.(z) And a tenant at will, e. g. a purchaser of the fee, let into possession before payment of all the purchase money, may by transferring the possession create another tenancy at will by possession, under which he may have his own right barred.(a)

(s) *Doe v. Liversedge*, 11 M. & W. 517; 555; *Doe v. Groves*, 10 Q. B. 486; *Doe v. Bold*, 11 Q. B. 127.

(t) S. 6; *Holland v. Clark*, 1 Yo. & Col. C. C. 170. (z) Same cases; see *Doe v. Barnard*, 9 Ad. & El. N. S. 868, n.; 13 Ad. & El. N. S. 945; *Dixon v. Gayfere*, 17 Beav. 421; Sugd. Stat. 55; and as to tenant by sufferance, *Id.* 56.

(u) S. 7; *Doe v. Phillips*, 10 Q. B. 130; *Garrard v. Tuck*, 8 C. B. 231; 13 Jur. 871, *sup.*; *Doe v. Angell*, 9 Ad. & El. N. S. 355, 356.

(x) *Doe v. Page*, 5 Q. B. 767; 9 Q. B. 867. (a) *Doe v. Carter*, 9 Q. B. 863; *Doe v. Rock*, 4 Man. & Gr. 30; *Randall v. Stevens*, 2 E. & B. 641; *Ley v. Peter*, 3 H. & N. 101; *Doe v. Edgar*, 2 Bing. N. S. 498; *Westbrook v. Kerrick*, 3 Fos. & Fin. 59.

(y) *Doe v. Thompson*, 5 Ad. & El. 532; 6 Ad. & El. 721; *Doe v. Moore*, 9 Q. B.

14. Where there is a tenancy from year to year or other period, without a lease in writing, the right of the person entitled subject thereto, accrues at the end of the first of such years, or at the last receipt of rent (which shall last happen),^(b) and a rent service (not pecuniary) is within this provision.^(c)

15. Where there is a tenancy under a lease in writing, at 20s. or upwards rent, and the rent has been received by a wrongful claimant of the reversion, and no payment of rent has been afterwards made to the rightful owner, the right of the person entitled accrues when the rent was first received by the wrongful claimant, and no right accrues upon the determination of the lease;^(d) so that now, by neglect of the real owner, payment to another will bar him,^(e) and this section is retrospective;^(f) but there is no foundation for the opinion that mere nonpayment of rent will operate as a bar.^(g) Where no rent is reserved the statute will not apply.^(h)

16. The possession of one coparcener, joint tenant, or tenant in common, is not the possession of any other,⁽ⁱ⁾ nor will his

(b) Sect. 8; *Doe v. Gower*, 16 Q. B. 589; *Doe v. Sumner*, 14 M. & W. 39; see 9 Ad. & El. N. S. 359; Sugd. Stat. 59-61.

(c) *Doe v. Benham*, or *Billett*, 7 Q. B. 976; see *Doe v. Hinde*, 2 Moo. & Ro. 441.

(d) Sect. 9.

(e) 9 Q. B. 341.

(f) *Ib.* 359.

(g) *Ex parte Jones*, 4 Yo. & Col. 466; see *Doe v. Oxenham*, 7 M. & W. 131; *Chadwick v. Broadwood*, 3 Beav. 308; Sugd. Stat. 62; see *Archbold v. Scully*, 8 Ir. Ch. Rep. 177; 9 Ir. Ch. Rep. 152; reversed in D. P. 7 Jur. N. S. 1169.

(h) *Doe v. Oxenham*, *ubi sup.*; *Crosbie v. Sugrue*, 9 Ir. L. Rep. 17; *Hayes v. Woodley*, 3 Ir. Ch. Rep. 142.

(i) Sect. 12; *Culley v. Taylerson*, 3 Per. & Da. 539, 11 Ad. & El. 1008; *Doe v. Horrocks*, 1 C. & K. 566; *Burroughs v. McCreight*, 1 J. & L. 290; *Ex parte Hassell*, 3 Yo. & Col. 617; see 16 M. & W. 712. [For the law upon this point, as it existed in England before this act, and as it now exists where the principles of this act have not been adopted, see 1

Cruise Dig. by Greenleaf, vol. 2, tit. 20, § 14, and notes, from which it appears that the possession and seisin of one tenant in common is the possession and seisin of the other, because such possession is not adverse to the rights of his companion, but in support of their common title. *Barnard v. Pope*, 14 Mass. 434; *Brown v. Wood*, 17 Mass. 68; *Shumway v. Holbrook*, 1 Pick. 114; *Catlin v. Kidder*, 7 Vt. 12; *Jackson v. Tibbetts*, 9 Cowen, 241; *Knox v. Silloway*, 1 Fairf. 201; *Parker v. Proprietor of Locks*, &c. 3 Met. 99; *Taylor v. Cox*, 2 B. Mon. 429; *Thomas v. Hatch*, 3 Sumner, 170; *Clymer v. Dawkins*, 3 How. (U. S.) 674; *Colburn v. Mason*, 25 Maine, 434. And although one tenant in common takes the whole profits, this does not divert the title of his companion. See *Lloyd v. Gordon*, 2 Harr. & M'H. 254; *Willison v. Watkins*, 3 Peters (U. S.), 51; *Chambers v. Chambers*, 3 Hawkes, 232. But one tenant in common may disseise another by actual ouster. See *Prescott v. Nevers*, 4 Mason, 330; *Parker v. Proprietors*, &c. 3 Met. 99; 1 *Cruise Dig. ubi supra*. But the disabil-

entry inure to any other,^(k) neither will the possession of any relation inure to the heir.^(l)

17. But an acknowledgment in writing of the title of the person entitled, given to him or his agent, signed by the person in possession, or receipt of the profits, makes the possession that of the person whose title is acknowledged, and his right will be held to first accrue at the time such acknowledgment, or the last, if more than * one was given,^(m) so that the moment after such an acknowledgment of title is given, time begins again to run.⁽ⁿ⁾ An acknowledgment may, of course, be made out from a correspondence,^(o) or from deeds,^(p) and it will speak only from the time of execution, and not from the date of the deed.^(q) So an answer on oath to a bill in chancery may be a sufficient acknowledgment to the plaintiff of his title within the statute.^(r) And a devisee in trust to sell and pay debts, and subject thereto in trust for A. may by himself or his agent give an acknowledgment to a creditor, which will save his right for twenty years.^(s)

ity of one tenant will not save the statute as to his co-tenants; for the privilege given by the statute is personal. And if the action is in its nature joint and it is barred as to one party, it is barred as to all. *Angell Lim.* (4th ed.) § 484; *Bryan v. Hinman*, 5 Day, 211; *Marsteller v. M'Cleane*, 7 Cranch, 156; *Doe v. Barksdale*, 2 Brock. 436; 2 Cruise Dig. by Mr. Greenleaf, vol. 3, tit. 31, Prescription, ch. 2, § 24, note; *South v. Thomas*, 7 Monroe, 59; *Caldwell v. Black*, 5 Ired. 463. But see *Gourdine v. Theus*, 1 Brevard, 326, where it was held that if one of several joint owners of an estate in land be a minor, and the rest are above age, the right of all shall be saved from the operation of the limitation act, by the infancy of the minor. So in *Thompson v. Gaillard*, 3 Rich. 418. But this is not generally the law. *Moore v. Armstrong*, 10 Ohio, 11; see *M'Ree v. Alexander*, 1 Dev. 321; *Wade v. Johnson*, 5 Humph. 117. And in some cases it has been held, that a bar against one of several children, claiming in their representative character, operates against the whole. *Rider v. Frion*, 3 Murph. 577. In Kentucky, when a joint right descends to sev-

eral, all must be under disability at the time to bring them within the saving of the statute; but when all are under disability, they are protected until the disability is removed as to all. *Riggs v. Dooley*, 7 B. Mon. 236.]

(k) *Doe v. Woodroffe*, 10 M. & W. 608; 15 M. & W. 769; 2 H. L. Cas. 811; *Denys v. Shuckburgh*, 4 Yo. & Col. 42.

(l) Sect. 13; *Scott v. Nixon*, 3 Dru. & War. 388.

(m) Sect. 14; *Doe v. Edmonds*, 6 M. & W. 295; *Fursdon v. Clogg*, 10 M. & W. 572.

(n) *Burroughs v. M'Creight*, 1 J. & L. 290. So time runs after every entry by the owner not followed by possession, *Allen v. England*, 3 Fos. & Fin. 49.

(o) *Incorpor. Sy. v. Richards*, 1 Dru. & War. 258; *Fursdon v. Clogg*, *ubi sup.*

(p) *Lewis v. Thomas*, 3 Hare, 34; see Sugd. Stat. 67.

(q) *Jaynes v. Hughes*, 16 C. B. 430.

(r) *Goode v. Job*, 5 Jur. N. S. 145.

(s) *Ld. St. John v. Boughton*, 9 Sim. 219; see *Smith v. Thomas*, 18 Q. B. 134; *Nash v. Hodgson*, 1 Kay, 650; *Spickernell v. Hotham*, *Id.* 669; *Prance v. Symp-*

18. There is a general saving for disabilities of ten years from the time at which the person to whom the right *first* accrued ceased to be under disability *or died* (which shall first happen).^(t) But even in case of disabilities there is no remedy but within forty years after the time at which such right first accrued, although the person under disability at such time has remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years from the time at which he ceased to be under any such disability, or died, has not expired.^(u) Nor although the person under a disability dies without having ceased to be under such disability is any time beyond the period of twenty years, or the period of ten years, allowed by reason of any disability of any other person, or, in other words, a succession of disabilities does not extend the time.^(u')

son, *Id.* 678; *Toft v. Stephenson*, 1 De G., M. & G. 28.

(t) Sect. 16, 19; *Devine v. Holloway*, 14 Moo. P. C. 290. [See *Willson v. Betts*, 4 Denio, 201; *Melvin v. Locks & Canals* on Merrimac River, 16 Pick. 161, 168; S. P. 5 Met. 15, 24; 2 Cruise Dig. by Mr. Greenleaf, vol. 3, tit. 31, Prescription, ch. 2, § 41, in note.]

(u) Sect. 17; *Doe v. Bramston*, 3 Ad. & El. 63, s. 18. [See *Melvin v. Locks & Canals* on Merrimac River, 16 Pick. 161, 168; S. P. 5 Met. 15, 34.] For what is beyond seas, s. 19; see *Ex parte Hasell*, 3 Yo. & Col. 617; *Devine v. Holloway*, *ubi sup.*; [Richardson v. Richardson, 6 Ham. 125; *Whitney v. Goddard*, 20 Pick. 304; *Whitlocke v. Walton*, 2 Murph. 23; *Earle v. M'Dowell*, 1 Dev. 16; *Smith v. Michell*, 1 Rice, 316; *Field v. Dickenson*, 3 Pike, 409; *King v. Lane*, 7 Missou. 241; *Bedford v. Bradford*, 8 Misson. 233; *M'Bride v. Moore*, *Wright* (Ohio), 524; *Whitney v. Webb*, 10 Ohio, 513.]

(u') [See *Caldwell v. Thorp*, 8 Ala. 253; *Ruff v. Bull*, 7 Harr. & J. 14; *Eager v. Commonwealth*, 4 Mass. 182; *Bunce v. Wolcott*, 2 Conn. 27; *Demarest v. Wynkoop*, 3 John. Ch. 129, 138-144; *Bailey v. Jackson*, 6 John. 210; *Jackson v. Robbins*, 16 John. 169; *Doe v. Barksdale*, 2 Brock. 436; *Wilson v. Betts*, 4 Denio, 201; *Mercer v. Selden*, 1 How. (U. S.) 37; S. C.

17 Peters, 37; *Boyce v. Dudley*, 8 B. Mon. 511; *Carpenter v. Schermerhorn*, 2 Barb. 314; *Downing v. Ford*, 9 Dana, 391; *Guion v. Bradley Academy*, 4 Yerger, 232; *Whitney v. Webb*, 10 Ohio, 513; *Dugan v. Gittings*, 3 Gill, 138; *Currier v. Gale*, 3 Allen, 330; *Killian v. Watt*, 3 Murph. 167; *McFarland v. Stone*, 17 Vt. 165; *Den v. Richards*, 3 Green (N. J.), 347; *Stevenson v. McReary*, 12 Sm. & M. 9; *Phillips v. Sinclair*, 20 Maine, 269; *Parson v. McCracken*, 9 Leigh, 495; *South v. Thomas*, 7 Monroe, 59; *Pearce v. House*, 2 Taylor, 305; *Fewell v. Collins*, 3 Brevard, 286; *Fleming v. Griswold*, 3 Hill, 85; *Moers v. White*, 6 John. Ch. 372; *Hall v. Vandegrift*, 2 Binn. 374; *Dow v. Warren*, 6 Mass. 328; *Richardson v. Whitefield*, 2 McCord, 148; *Stevens v. Bomar*, 9 Humph. 546; *Dease v. Jones*, 23 Miss. (1 Cush.) 133; *Jackson v. Wheat*, 18 John. 40; *Scott v. Haddock*, 11 Geo. 258; *Bradstreet v. Clark*, 12 Wend. 602; *Butler v. Howe*, 13 Maine, 397; *Dekay v. Durrah*, 2 Green (N. J.), 294. If there are in existence several disabilities at the time the cause of action accrues, the statute does not begin to run until the party has survived them all. *Dugan v. Gittings*, 3 Gill, 138; *Butler v. Howe*, 13 Maine, 397; *Jackson v. Johnson*, 5 Cowen, 74; *Demarest v. Wynkoop*, 3 John. Ch. 129; *Scott v. Haddock*, 11 Geo. 258. But where

19. Where a woman seised in fee and her husband continued in possession for some years after the marriage, but more than forty years before the commencement of the action they left the place, and did not afterwards exercise any act of ownership, or occupy the estate, and the wife died in 1828, and the husband in 1832, and her eldest son brought an ejectment in 1835, it was held that he was barred by the statute.(x) This is a direct decision that forty years' possession, although not adverse in the sense of that expression under the old law, will gain a title. But a conveyance by husband and wife of her estate not operative to bind her, would not make time run *against her until her husband's interest which passed by the conveyance determined.(y) Time will not run until after the death of tenant for life where the possession can be referred to his tenancy.(z)

20. It should be kept in view, that forty years are not a bar against all the world. The twenty years form the regular bar, and the savings are the exception, and the forty years run only in the case of disabilities, in even which case not more than forty years are allowed. But the twenty years run only from the time when the right first accrued, and that in the case of a remainder, for example, is not until it falls into possession, which event, in the common case of an estate for life with a remainder over, may not happen within forty years of its creation.

21. The bar by time against a tenant in tail bars all persons whose estates he might lawfully have barred,(a) and when time

the disability to sue grows out of some positive statutory provision, the time during which such temporary disability continues should be excluded from the computation of the period of limitation. And this forms an exception to the rule that the statute, after it commences to run, continues, notwithstanding a subsequent disability. *Dowell v. Webber*, 2 Sm. & M. 452. In South Carolina a minor has five full years after his title to land accrues, within which to bring his action, notwithstanding the statute of limitations had begun to run in the time of his ancestor, under whom he claimed by descent. *Rose v. Daniel*, 3 Brevard, 438. See, also, for

Kentucky, *South v. Thomas*, 7 Monroe, 59.]

(x) *Doe v. Bramston*, 3 Ad. & El. 63; *qu.* whether the case did not fall within the 15th section; see *Sugd. Stat.* 70-84.

(y) *Jumpson v. Pitchers*, 13 Sim. 327; *Cannon v. Rimington*, *Rimington v. Cannon*, 12 C. B. s. 18; see *Doe v. Groves*, 10 Ad. & El. N. S. 486; [*Melvin v. Locks & Canals on Merrimac River*, 16 Pick. 137, 161; 5 Met. 13, 34.]

(z) *Lewis v. Rees*, 3 K. & J. 132; [*ante*, 480, note (q).]

(a) Sect. 21; *Goodall v. Skerratt*, 3 Drew. 216; *Austin v. Llewellyn*, 9 Ex. 276.

has begun to run against him, although he die it will continue to run against those whose rights he might lawfully have barred.(b) These provisions refer simply to possession against the right of a tenant in tail, and would not, it seems, be affected by any incapacity on his part, from lunacy for example, to make a valid assurance, for his disability is provided for by the savings in the statute; and these provisions were not meant to be dependent on the personal capacity of the individual, but to refer to the quality and extent of his estate. Both of these sections have a retrospective operation.(c) Where the tenant in tail has *made an assurance*, but not effectual, to bar the remainders, possession by virtue of such assurance for twenty years — after the time at which such assurance if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, *without the consent of any other person*, have operated to bar such estate, — will render such assurance effectual against the estates in remainder.(d) This latter provision seems to be prospective only, and it assumes that the assurance was valid to bind the issue, but required to be made good by time against the remainder-men only. The assurance referred to is the one made by the tenant in tail. The operation of the clause, therefore, is not strictly to make time a bar, but to make time give a full operation to the assurance executed by the tenant in tail. The effect of the clause is, that where tenant in tail executes a deed enrolled under the late act, which, for want of the consent of the *protector, operates only to create a base fee, under which possession is obtained, the title will become good against those in remainder at the end of twenty years from the period when the tenant in tail, or his issue, could without the consent of any third person have barred the remainders over under the substitution for recoveries act. But this operation will not be effected if the assurance already executed would not, if then executed without consent, have operated to bar the estates in remainder. It will be necessary, therefore, in all such cases, to ascertain that the assurance was duly made and enrolled. But base fees cre-

(b) Sect. 22.

(d) Sect. 23; *Penny v. Allen*, 7 De G.,(c) *Austin v. Llewellyn*, *ubi sup.*; Sugd. M. & G. 409; Sugd. Stat. 81. Stat. 85.

ated before the act by tenant in tail in possession are probably unassailable, for in most such cases the remainders were discontinued and turned to a right. If a base fee had continuance on the 1st June, 1835, yet a remainder-man *whose right of entry had been taken away by discontinuance* could not maintain any suit or action until the determination of the base fee, and consequently it seems that his remedy is taken away by the thirty-sixth section, which abolishes real actions, and is not saved by the subsequent sections. Still this would leave the question open as to base fees, where there was no discontinuance.^(e)

22. Suits in equity are confined to the period allowed for actions at law; ^(f) and where there is any *express trust*,^(f¹) the

(e) Sect. 38; Sugd. Stat. 90.

(f) Sect. 24; *Wrixon v. Vize*, 3 Dr. & War. 104; *Henderson v. Atkins*, 28 L. J. N. S. 913; *Obee v. Bishop*, 6 Jur. N. S. 10, 132; see 1 De G., F. & J. 137. [The rule of courts of equity, aside from any statute expressly applied to them, has generally been, in proper cases, to act either in obedience to, or upon the analogy of the general statute of limitations of actions at law. 2 Story Eq. Jur. §§ 1521, 1521 a; 1 Dan. Ch. Pr. (4th Am. ed.) 559, 560, & notes, 639-641, & notes; *Acherley v. Roe*, 5 Ves. (Sumner's ed.) 573, note (a), and cases cited; *Baker v. Biddle*, Bald. 419; *Graham v. Torrance*, 1 Ired. Eq. 210; *Parks v. Rucker*, 5 Leigh, 149; *Rayner v. Pearsall*, 3 John. Ch. 578; *Bowman v. Wathen*, 2 M'Lean, 376; *Chapman v. Butler*, 22 Missou. 19; *Burton v. Dickinson*, 3 Yerger, 112; *Spring v. Gray*, 5 Mason, 527, 528; *Sherwood v. Sutton*, 5 Mason, 143; *Kane v. Bloodgood*, 7 John. Ch. 90; *Bank of United States v. Daniel*, 12 Peters (U. S.), 32, 56; *Baker v. Whiting*, 3 Sumner, 475; *Robinson v. Hook*, 4 Mason, 150; *Tiernan v. Rascaniere*, 10 Gill & J. 218; *Raymond v. Simonson*, 4 Blackf. 83; *George v. Johnson*, 45 N. H. 456; *Atwater v. Fowler*, 1 Edw. Ch. 417; *Phillips v. Sinclair*, 20 Maine, 269; *Denny v. Gilman*, 26 Maine, 149, 154; *Demarest*

v. Wynkoop, 3 John. Ch. 129; 4 Kent (11th ed.), 187; *Dexter v. Arnold*, 3 Sumner, 152; *Phillips v. Rogers*, 12 Met. 405; *Farnam v. Brooks*, 9 Pick. 212; *Dodge v. Essex Ins. Co.* 12 Gray, 71; *Marsh v. Oliver*, 1 McCarter (N. J.), 259; *Pierson v. David*, 1 Clarke (Iowa), 23; *Sublette v. Tinney*, 9 Cal. 428; *Harris v. Mills*, 28 Ill. 44; *M'Dowell v. Heath*, 3 A. K. Marsh. 223; *Elmendorf v. Taylor*, 10 Wheat. 152; *Miller v. M'Intyre*, 6 Peters (U. S.), 71; *Bigelow v. Bigelow*, 6 Ohio, 97; *Banks v. Judah*, 8 Conn. 145; *Boone v. Chiles*, 10 Peters (U. S.), 177; *People v. Everest*, 4 Hill, 71; *Ferson v. Sanger*, *Davies's Rep.* 252; *Taylor v. Benham*, 5 How. (U. S.) 233; *Perkins v. Cartwell*, 4 Har. (Del.) 270; *Manchester v. Mathewson*, 3 R. I. 237; *Hayden v. Bucklin*, 9 Paige, 512; *Ridley v. Hetman*, 10 Ohio, 524; *Conover v. Conover*, 1 Saxton, 403.]

(f¹) [In case of an express trust, the statute of limitations has no application, and no length of time bars the claim as between the trustee and *cestui que trust*. *Cook v. Williams*, 1 Green Ch. 209; *Armstrong v. Campbell*, 3 Yerger, 201; *Baker v. Whiting*, 3 Sumner, 476; *Overstreet v. Bate*, 1 J. J. Marsh. 370; *Trecothick v. Austin*, 4 Mason, 16; 2 Dan. Ch. Pr. (4th Am. ed.) 560, in note; *Wed-*

right of the *cestui que trust* to bring a suit will first accrue at the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration,^(g) and shall then be deemed to have accrued only as against such purchaser and any person claiming through him,^(h) unless in the case of a *con-*

derburn v. Wedderburn, 2 Keen, 749; Smith v. Acton, 26 Beav. 210; Decouche v. Savetier, 3 John. Ch. 190; Kane v. Bloodgood, 7 John. Ch. 90; Coster v. Murray, 5 John. Ch. 224; Goodrich v. Pendleton, 3 John. Ch. 384; Gist v. Cat-tell, 2 Desaus. 53; Wamburzee v. Kennedy, 4 Desaus. 474; Thomas v. White, 3 Litt. 177; Turrill v. Murray, 4 Yerger, 104; Stephen v. Yandle, 3 Hayw. 221; Zacharias v. Zacharias, 23 Penn. St. 425; Fleming v. Culbert, 46 Penn. St. 496; Martin v. Jackson, 27 Penn. St. 506; Kutz's Appeal, 40 Penn. St. 90; Lyon v. Marclay, 1 Watts, 275; Walker v. Walker, 16 Serg. & R. 379; McDowell v. Goldsmith, 6 Md. 319; Thomas v. Brinsfield, 7 Geo. 154; Tinnen v. McCane, 10 Texas, 248; Manton v. Titsworth, 18 B. Mon. 582; Tucker v. Tucker, 1 McCord Ch. 176; Presley v. Davis, 7 Rich. Eq. 105; Gay v. Edwards, 30 Miss. 218; Carter v. Bennett, 6 Florida, 214; Smith v. Callo-way, 7 Blackf. 86; McDonald v. Sims, 3 Kelly, 383; Murdock v. Hughes, 7 Sm. & M. 219; Foscue v. Foscue, 2 Ired. Eq. 321; North v. Barnum, 12 Vt. 206; Pinkston v. Brewster, 14 Ala. 315; Boone v. Chiles, 10 Peters (U. S.), 177; Zeller v. Eckert, 4 How. (U. S.) 289; Creigh v. Henson, 10 Grattan, 231; Perkins v. Cartwell, 4 Harr. 270; Blount v. Robeson, 3 Jones Eq. 73; Cunningham v. McKindley, 22 Md. 149; Cholmondeley v. Clinton, 2 Mer. 93; Prevost v. Gratz, 6 Wheat. 481. A trustee is under no circumstances allowed to set up a title adverse to his *cestui que trust*, while the relation continues. Stone v. Godfrey, 5 De G., M. & G. (Am. ed.) 76, note (1); Huntly v. Huntly, 8 Ired. Eq. 250. In Baker v. Whiting, 3 Sumner, 475, 486, it was said by Mr. Justice Story, that the doctrine that, in equity, length of time is no bar to a trust clearly established is regularly true, when it is received with

the accompanying limitations; that no circumstances exist to raise a presumption from lapse of time of an extinguishment of the trust, and no open denial or repudiation of the trust is brought home to the knowledge of the parties in interest, which requires them to act as upon an asserted adverse title. See Hunter v. Marlboro, 2 Wood. & M. 199; Boone v. Chiles, 10 Peters (U. S.), 223; Zeller v. Eckert, 4 How. (U. S.) 289. In Kane v. Bloodgood, 7 John. Ch. 90, Mr. Chancellor Kent said: "So long as the trust is a subsisting one, and admitted by the acts or declarations of the parties, no doubt the statute does not affect it, but when such transactions take place between the trustee and *cestui que trust*, as would in the case of tenants in common amount to an ouster of one of them by the other, I can hardly suppose that a court of equity would consider length of time afterwards of no consequence. There is no good reason why the statute of limitations should not apply to such a case, as well as to cases of constructive trusts, and to cases of detected fraud, and to all other cases in which the statute is assumed as a rule of decision." See Willison v. Watkins, 3 Peters (U. S.), 52. The possession of a *cestui que trust*, however long continued, will not defeat the legal title of the trustee, unless there is a distinct denial of such title and a possession wholly inconsistent therewith. The presumption is that the possession of a *cestui que trust* is not adverse to the title of the trustee. Whiting v. Whiting, 4 Gray, 241.]

(g) As to the remedy against the trustee, see Malone v. O'Connor, Dru. temp. Napier, 653, 654; Sugd. Stat. 97.

(h) S. 25; Salter v. Cavanagh, 1 Dru. & Wal. 668; Burne v. Robinson, *Id.* 688; Dillon v. Cruise, 3 Ir. E. R. 70; Thompson v. Simpson, 1 Dru. & War. 459; Att.

cealed fraud, when the right will first accrue at the time at which such fraud shall or with reasonable diligence might have been first known; (*h*¹) but no owner of lands or rents can, under this provision, have a suit in equity for the recovery of them, or for setting aside any conveyance of them on account of fraud, against any *bonâ fide* purchaser for valuable consideration who has not assisted in the commission of such fraud, and who at the time that * he made the purchase did not know and had no reason to believe that any such fraud had been committed. (*i*) This section does not mean the case of a party entering wrongfully into possession; it means a case of designed fraud, by which a party, knowing to whom the right belongs, conceals the circumstances giving that right, and by means of such concealment enables himself to enter and hold. (*k*)

23. It is now settled that this statute makes time a bar even against charities, but in most cases their rights would be saved under a later section (s. 25), as, in general, charity estates are held under express trusts, and whilst the right of the trustees remains unbarred the interests of the charities cannot be affected by the trustees. (*l*) The bar by time applies to improvident leases. (*m*)

Gen. v. Flint, 4 Hare, 147; Law v. Bagwell, 5 Dru. & War. 398; Petre v. Petre, 1 Drew. 393; Hicks v. Sallitt, 3 De G., M. & G. 782; 18 Jur. 913; Hicks v. Hastings, 3 K. & J. 701; Scott v. Scott, 11 Ir. E. R. 487; 4 H. L. Cas. 1065; Sugd. Stat. 100; Dixon v. Gayfere, 17 Beav. 421, which consider; Sugd. Stat. 104-109; Hope v. Liddell, 21 Beav. 183; 2 Jur. N. S. 105; Knight v. Bowyer, 23 Beav. 609; 2 De G. & J. 421, aff'd; see Case v. James, not depending on the statute, 29 Beav. 512; Pare v. Clegg, *Ib.* 1136; Sturgis v. Morse, 3 De G. & J. 1; 24 Beav. 541; 2 De G., F. & J. 223; see the cases on s. 25, in pl. 8, *supra*; Bullock v. Downes, 9 H. L. Cas. 1.

(*h*¹) [*Ante*, 254, note (*r*¹); 1 Dan. Ch. Pr. (4th Am. ed.) 645, note (3), and cases cited; Farnam v. Brooks, 9 Pick. 212; Dodge v. Essex Ins. Co. 12 Gray, 65, 71; Cole v. M'Glatthy, 9 Greenl. 131.]

(*i*) S. 26; Lewis v. Thomas, 3 Hare, 26; Smith v. Acton, 26 Beav. 210; Sturgis v. Morse, *ubi sup.*; Dean v. Thwaite, 21 Beav. 621; Thruston v. Anstey, 27 Beav. 335; Life Assoc. of Scotland v. Liddall, 7 Jur. N. S. 785; 3 De G., F. & J. 58; Burroughs v. M'Creight, 1 J. & L. 290; Comm's. of Char. Don. v. Wybrants, 2 J. & L. 191; Hunt v. Bateman, 10 Ir. Eq. R. 360.

(*k*) Petre v. Petre, 1 Drew. 397, *per Cur.*

(*l*) Incorp. Soc. v. Richards, 1 Dru. & War. 258; Att. Gen. v. Persse, 2 Dru. & War. 67; Comm's. Charitable Don. v. Wybrants, 2 J. & L. 182; Att. Gen. v. Magdalen Col. 18 Beav. 220; reversed in D. P. 6 H. L. Cas. 189; Att. Gen. v. Wilkins, 17 Beav. 285; Att. Gen. v. Davey, 19 Beav. 521; reversed 4 De G. & J. 136.

(*m*) Att. Gen. v. Payne, 27 Beav. 168; Att. Gen. v. Davey, 19 Beav. 521, 4 De

24. A trust is not created under s. 25 by a mere charge upon land in a devise, nor by a conveyance to a purchaser subject to an incumbrance.(n)

25. Filing a bill, though no subpœna be served, is sufficient to prevent the operation of the statute.(o) The appointment of a receiver by the court does not prevent the bar under the statute against a stranger; but such an appointment prevents, at least in equity, time from running in favor of a stranger to a suit.(p) The act does not interfere with any rule or jurisdiction of courts of equity in refusing relief on the ground of acquiescence or otherwise to any person whose right to bring a suit may not be barred by the act.(q)

* 26. The existing rule as to mortgagees in possession is adopted.(q¹) The mortgagor is to be barred at the end of

G. & J. 136; see *President of Magd. College v. Att. Gen.* 6 H. L. Cas. 189.

(n) *Harrison v. Duignan*, 2 Dru. & War. 295; *Hughes v. Kelly*, 3 Dru. & War. 482; *Francis v. Grover*, 5 Hare, 39; *Hunt v. Bateman*, 10 Ir. Eq. R. 363; *Dundas v. Blake*, 11 Ir. Eq. R. 136; *Hughes v. Williams*, 3 Mac. & G. 683; *Chappell v. Rees*, 1 De G., M. & G. 393; *Thruston v. Anstey*, 27 Beav. 335; *Hodge v. Churchyard*, 16 Sim. 71; *Bentley v. Robinson*, 10 Ir. Ch. R. 287.

(o) *Boyd v. Higginson*, 1 Fla. & Ke. 603; *Harrison v. Duignan*, 2 Dru. & War. 295; *Forster v. Thompson*, 4 Dru. & War. 303; *Purcell v. Blennerhasset*, 3 J. & L. 24; *Carroll v. Darcy*, 10 Ir. E. R. 321; *Bennett v. Bernard*, *Ib.* 584; *Morris v. Ellis*, 7 Jur. 413; *Dixon v. Gayfere*, 17 Beav. 421; *Hele v. Ld. Bexley*, 20 Beav. 127; *Groom v. Blake*, 6 Ir. C. L. R. 400, 8 Ir. C. L. R. 428; *Humble v. Humble*, 24 Beav. 535.

(p) *Wrixon v. Vize*, 3 Dru. & War. 123; *Parkinson v. Lucas*, 28 Beav. 627.

(q) S. 27; *Thompson v. Simpson*, 1 Dru. & War. 459; *Sibbering v. Lord Balcarras*, 3 De G. & Sm. 735; 19 L. J. N. S. 252; *Stone v. Godfrey*, 1 Sm. & Gif. 590, 5 De G., M. & G. 76; *Bright v. Legerton*, 29 Beav. 69; *Rolfe v. Gregory*, 8 Jur. N. S. 606.

(q¹) [The rule seems to be well settled in equity, that possession by the mortgagee or his assignees for a period of time which would bar a writ of entry, without an acknowledgment of a subsisting mortgage, operates as a bar to the right of redemption, unless the mortgagor can bring himself within the proviso in the statute of limitations. *Phillips v. Sinclair*, 20 Maine, 269; *Demarest v. Wynkoop*, 3 John. Ch. 129; *Gates v. Jacob*, 1 B. Mon. 308; *Hatfield v. Montgomery*, 2 Porter, 58; 4 Kent (11th ed.), 187, 188, & notes; *Moore v. Cable*, 1 John. Ch. 385; 2 Story Eq. Jur. § 1028 a; *Kane v. Bloodgood*, 7 John. Ch. 90; *Slee v. Manhattan Bank*, 1 Paige, 48; *Dexter v. Arnold*, 3 Sumner, 152. So the mortgagee may equally, on his part, be barred by lapse of time. If he has suffered the mortgagor to remain in possession for a period of years, generally fixed at twenty after the breach of the condition, without any payment of principal or interest, or any claim or admission of the debt or duty, the right to file a bill for foreclosure will generally be deemed to be barred and extinguished. The period of twenty years is taken by analogy to the period of limitation at law for tolling the entry of the true owner. 4 Kent (11th ed.), 189, 190; *Moore v. Cable*, 1 John. Ch. 385; *Giles v. Baremore*, 5 John. Ch.

twenty years from the time of taking possession, or from the last written acknowledgment, and when there shall be more than one mortgagor, such acknowledgment, if given to any of such mortgagors or his or their agent, will be effectual; but where there is more than one mortgagee, such acknowledgment, signed by one or more of such mortgagees, will be effectual only as against the party or parties signing.^(r) The acknowledgment may be made out by letters or deeds,^(s) but a transfer of a mortgage, subject to the equity of redemption, has been held not to amount to an acknowledgment.^(t) The provision is retrospective.^(u)

27. Where the mortgagee is also tenant for life of the land, the statute does not begin to run against the right to the mortgage until his death; and it is said that the same rule applies where the mortgagee is one of several tenants in common of the

- 545; *Harris v. Mills*, 28 Ill. 44; 2 Story Eq. Jur. § 1028 *b*; *Howland v. Shurtleff*, 2 Met. 26; *Collins v. Torrey*, 7 John. 278; *Cheever v. Perley*, 11 Allen, 584; *Jackson v. Wood*, 12 John. 242; *Jackson v. Pratt*, 10 John. 381; *Inches v. Leonard*, 12 Mass. 379; *Trash v. White*, 3 Bro. C. C. (Perkins's ed.) 291, note (a), and cases cited; *Hillary v. Waller*, 12 Ves. (Sumner's ed.) 239; *Ross v. Norvell*, 1 Wash. 14; *Morgan v. Davis*, 2 Harr. & M'H. 9; *Brewer v. Thomas*, 28 Maine, 85; *Martin v. Bowker*, 19 Vt. 526; *M'Donald v. Sims*, 3 Kelly, 383; *Field v. Wilson*, 6 B. Mon. 479. This, however, would be only presumptive proof of payment. It would not be a statute bar. *Bacon v. McIntire*, 8 Met. 87, 90; *Joy v. Adams*, 26 Maine, 333. This presumption is always liable to be controlled by evidence. 4 Kent (11th ed.), 189, 190; *Howland v. Shurtleff*, 2 Met. 26; *Hughes v. Edwards*, 9 Wheat. 489; *Cheever v. Perley*, 11 Allen, 584; *Calkins v. Calkins*, 3 Barb. 305. An acknowledgment of the mortgage title by the mortgagee by keeping accounts and in other ways within the limited period, maintains the equity of redemption. *Edsell v. Buchanan*, 4 Bro. C. C. (Perkins's ed.) 254, 256, and cases cited; *Slee v. Manhattan Co.* 1 Paige, 48; *Fenwick v. Macey*, 1 Dana, 279; *Hughes v. Edwards*, 9 Wheat. 489; *Dexter v. Arnold*, 3 Sumner, 152; *Marks v. Pell*, 1 John. Ch. 594; *Demarest v. Wynkoop*, 3 John. Ch. 129; *Hodley v. Henley*, 6 Mad. 181; *Martin v. Bowker*, 19 Vt. 526; *Morgan v. Morgan*, 10 Geo. 297; *Chouteau v. Burlando*, 20 Missou. 482; *Robinson v. Fife*, 3 Ohio St. 551; *ante*, 479, s. 9. The time is to be computed from the last period at which the parties treated the transaction as a mortgage. *Shepperd v. Murdock*, 3 Murph. 218. The mortgagor cannot defeat the right of the mortgagee to enter upon the land, or to obtain possession thereof, by showing merely that the personal security, to which the mortgage is collateral, has become barred by the statute. *Joy v. Adams*, 26 Maine, 330; *Thayer v. Mann*, 19 Pick. 535.]
- (r) S. 28; see the section as to a divided part; *Browne v. Bishop of Cork*, 1 Dru. & Wal. 700; *Hyde v. Dallaway*, 2 Hare, 528.
- (s) *Sup.*
- (t) *Lucas v. Dennison*, 13 Sim. 584; see *Pendleton v. Booth*, 1 Giff. 35, 1 De G., F. & J. 81; *Sugd. Stat.* 113.
- (u) *Batchelor v. Middleton*, 6 Hare, 75.

land.(x) A mortgagee of a reversionary interest in stock vested in trustees may recover the fund whenever it falls into possession, for the trust remains.(y)

28. No spiritual or eleemosynary corporation sole can recover any land or rent unless within two incumbencies, and six years after a third person shall have been appointed, or within sixty years if those periods shall not amount to sixty years.(z)

29. And no advowson can be recovered by any person after three clerks in succession have held the same adversely, if the times of such incumbencies together shall amount to the full period of sixty years; and if not, then after the expiration of such further time as with the time of such incumbencies will make up the period of sixty years.(a) Incumbencies by lapse will be deemed adverse, but not so incumbency in consequence of promotion to a bishopric.(b) And every person whom the owner of an estate tail in the advowson might have barred, will be deemed to claim through him, and the right will be limited accordingly.(c) But no advowson is to be recovered after *one hundred years from the time at which a clerk has obtained possession of such benefice adversely to the claimant, or of some person through whom he claims; or of some person *entitled to some preceding estate or interest* under the same title, unless a clerk has subsequently obtained possession of such benefice on the presentation of the claimant, or of some such person as before mentioned.(d)

30. No money secured upon any land or rent, at law or in equity, or any legacy,(d¹) is recoverable, but within twenty years

(x) *Wynne v. Styan*, 2 Phil. 303; *Hyde v. Dallaway*, 2 Hare, 528; as to payment of charges by tenant for life, see *Burrell v. Ld. Egremont*, 7 Beav. 205; *Lord Carbery v. Preston*, 13 Ir. Eq. R. 455; *Clarke v. Bodkin*, *Ib.* 492; *Lord Kensington v. Bouverie*, 19 Beav. 50, 7 De G., M. & G. 134; *Gregson v. Hindley*, 10 Jur. 283.

(y) *Re Lowe's Sett.* 30 Beav. 95.

(z) S. 39; *Abp. of Dublin v. Lord Trimleston*, 12 Ir. Eq. R. 251. [In Maine, Massachusetts, and Michigan, there is an exception, out of the several statutes of

limitations, in favor of a minister or other successor of a sole corporation; who is permitted to sue notwithstanding his predecessor was disseised and barred by his own laches, provided the suit be brought within five years after the death, removal, or resignation of the predecessor who was disseised.]

(a) S. 30.

(b) S. 31.

(c) S. 32.

(d) S. 33.

(d¹) [Payment of a legacy, charged gen-

after a present right to receive the same has accrued to some person capable of giving a discharge for or release of the same, unless in the mean time some part of the principal money, or some interest thereon, has been paid,^(e) or some acknowledgment^(f) of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case the twenty years are to run from such payment or acknowledgment;^(g) which provision relates not to the land, but to actions brought to recover the money; and those actions, in the case of mortgages, are either upon the covenant usually inserted in the mortgage deed or on the bond which commonly accompanies it;^(h) but still it has been held that this part of the statute may be pleaded to a bill of foreclosure, which, it is said, in effect is a proceeding for the recovery of the money secured by the mortgage,⁽ⁱ⁾ but this view has been doubted.^(k) The general provision under like conditions has since been extended so as to bar claims to the personal estate of intestates.^(l) A vendor's lien for purchase money has been held to be a charge of land within this provision.^(m) A judgment creditor of more than twenty years' standing who has neglected to take any step, cannot claim even the benefit of a suit instituted within the twenty years by another creditor on behalf of himself and all the

erally upon the land of the testator, was presumed under the circumstances, after the lapse of twenty years from the time when it became due and payable, in *Andrews v. Sparhawk*, 13 Pick. 393.]

(e) *Vincent v. Willington*, Long. & Tow. 456; *Burrowes v. Gore*, 6 H. L. Cas. 909; Sugd. Stat. 130.

(f) *Toft v. Stephenson*, 7 Hare, 1.

(g) S. 40; *Phillipo v. Munnings*, 2 My. & Cr. 309; *Ld. St. John v. Boughton*, 9 Sim. 219; *Dillon v. Cruise*, 3 Ir. E. R. 70; *Fortescue v. McKone*, 1 Jeb. & Sym. 341; *Palmer v. Algeo*, *Ib.* 501, 586; *Hill v. Stowell*, *Ib.* 389; *O'Hara v. Creagh*, 1 Long. & Tow. 65; *Vincent v. Willington*, *Ib.* 456; *Morrough v. Power*, 1 Long. & Tow. 644, as to 8 Geo. 1, c. 4, Ir.; *Wrixon v.*

Vize, 3 Dru. & War. 104; *Christian v. Devereux*, 12 Sim. 264; *Hughes v. Kelly*, 3 Dru. & War. 482; *Knox v. Kelly*, 6 Ir. E. R. 279; *Burrell v. Ld. Egremont*, 7 Beav. 205; *Henderson v. Atkins*, 28 L. J. N. S. 913. As to disabilities, see 19 & 20 Vict. c. 97, s. 10, 11, 12; and see Sugd. Stat. 121, & n.

(h) See 5 Ad. & El. 296.

(i) *Dearman v. Wyche*, 9 Sim. 570; *Du Vigier v. Lee*, 2 Hare, 326; *Sinclair, v. Jackson*, 17 Beav. 405.

(k) *Wrixon v. Vize*, 3 Dru. & War. 104.

(l) 23 & 24 Vict. c. 38, s. 13.

(m) *Toft v. Stephenson*, 7 Hare, 1; 1 De G., M. & G. 28; see 5 De G., M. & G. 735.

* other creditors, in which a decree was obtained within the twenty years.(n)

31. Where a fund has ceased to bear the character of a legacy, and has assumed the character of a trust fund, although it is still vested in the executor or his representative, a bill filed for the fund will be considered as a suit for the administration of the fund, and not as a bill for a legacy, and therefore it will not fall within this provision of the act; (o) and it has been decided that the statute extends to legacies of personalty,(p) as well as to those charged on realty.(q)

32. No arrears of dower, nor any damages on account of such arrears, can be recovered by action or suit for more than six years next before the commencement of such action or suit.(r) And no arrears of rent (s) or of interest in respect of any money charged upon or payable out of any land or rent, or in respect of any legacy,(t) or any damages in respect of such arrears of rent or interest, can be recovered but within six years next after the same respectively became due, or next after an acknowledgment of the same in writing has been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent.(u) But the possession of any prior incumbrancer within one year before an action or suit brought by any person entitled to a subsequent incumbrance, enables the latter to recover the arrears of interest during the whole time that such prior incumbrancer was in such possession,

(n) *Berrington v. Evans*, 1 Yo. & Col. Beav. 303; see *Harris v. Harris*, 29 Beav. 434; *Toft v. Stephenson*, 7 Hare, 1; see 110.
O'Kelly v. Bodkin, 2 Ir. E. R. 361; 3 Ir. (p) *Sheppard v. Duke*, 9 Sim. 567; see Reporters' note, 2 My. & Cra. 315.
Eq. Rep. 390; *Watson v. Birch*, 15 Sim. 523; *Hutchinson v. O'Sullivan*, 11 Ir. In *Campbell v. Sandford*, 8 Bli. N. S. 622, Lord Brougham observed that the late act had settled periods of limitation in other cases, but there was none fixed with respect to a legacy; *Sugd. Stat.* 109.
Eq. R. 443; *Bennett v. Bernard*, 12 Ir. (q) *Bullock v. Downes*, 9 H. L. Cas. 1.
Eq. R. 229; *Birmingham v. Burke*, 2 J. & L. 114; *Carroll v. Darcy*, 10 Ir. *Eq. R.* 321; *In re Colclough*, 8 Ir. Ch. R. 330; *Sugd. Stat.* 123-126.
 (r) *S.* 41.

(o) *Phillipo v. Munnings*, 2 My. & Cra. 309; *Young v. Ld. Waterpark*, 13 Sim. 204; *Roch v. Cullen*, 6 Hare, 531; *Playfair v. Cooper*, 23 L. J. 341; *Downes v. Bullock*, 25 Beav. 54; *Bullock v. Downes*, 9 H. L. Cas. 1; *Harcourt v. White*, 28 Ke. 556.
 (s) See *Paget v. Foley*, 2 Bing. N. C. 679.
 (t) *Goode v. Job*, 1 El. & El. 6.
 (u) *Barrett v. Birmingham*, 1 Fla. & Ke. 556.

although it exceeded six years ; (v) but to bring a case within this exception, the prior incumbrance must affect the interest upon which the other incumbrance is a charge.(x)

33. This last section, as to an annuity, provides for the case where * the title to the annuity is not disputed, but the distress is made for the arrears due.(y) It applies to an annuity charged upon land,(z) but not, it is said, to an annuity charged on personalty only.(a) There seems, however, strong ground to contend that s. 40, which extends to the corpus of a legacy charged upon personalty only, and includes, it should seem, an annuity as such, must govern the construction of s. 42, and that the *arrears* of such an annuity like the income or profit of any other general legacy, would be barred by nonpayment for the prescribed period.

34. And after some conflict of opinion, it appears to be decided that this section includes judgments as well as mortgages, and where the right to recover against the real estate is barred, the right to recover against the personal estate was said to be also barred.(b)

35. This section (42) extends to interest on money charged on land, which falls within s. 40,(c) and it also extends to interest on judgments,(d) and also to a mortgage with a covenant for payment, which does not fall within the later act of 3 & 4 W. 4, c. 42 ; (e) and tithe rentcharge is rent within this section.(f) (1)

(v) S. 42; *Drought v. Jones*, 2 Ir. E. R. 303; *Burne v. Robinson*, 1 Dru. & Wal. 688.

(x) *Mellish v. Brooks*, 3 Beav. 22; *Hodges v. Croydon Canal Co.* 3 Beav. 86; *Holland v. Clark*, 1 Yo. & Col. C. C. 151; *Hughes v. Kelly*, 3 Dru. & War. 482; *Upington v. Tarrant*, 13 Ir. Ch. R. 262.

(y) *Vincent v. Going*, 1 J. & L. 697.

(z) *James v. Salter*, 3 Bing. N. C. 544.

(a) *Francis v. Grover*, 5 Hare, 39.

(b) *In re Ashwell's Will*, 1 Johns. 112; see the judgment, Sugd. Stat. 137, 2d ed.

(c) *Kealy v. Bodkin*, 1 Sau. & Scu. 211, *contra*; but see *O'Kelly v. Bodkin*, 2 Ir. E. R. 361; 3 Ir. E. R. 390; *Henry v. Smith*, 2 Dru. & War. 381; *Du Vigier v. Lee*, 2 Hare, 326.

(d) *Henry v. Smith*, 2 Dru. & War. 381; *Du Vigier v. Lee*, 2 Hare, 326.

(e) *Hughes v. Kelly*, 3 Dru. & War. 428; 1 Mac. & G. 650; *Du Vigier v. Lee*, 2 Hare, 326; *Hunter v. Nockolds*, 1 Mac. & G. 640; *Forsyth v. Bristowe*, 8 Ex. 716; *Lewis v. Duncombe*, 30 L. J. N. S. 732; *Round v. Bell*, 30 Beav. 121; *Bolding v. Lane*, 8 Jur. N. S. 407; see now 16 & 17 Vict. c. 113, s. 3, and Sch. A, and s. 19, 20, 22, 21-25, 148-154, 166-189; 19 & 20 Vict. c. 97, s. 10-14.

(f) *Ecclesiastical Commissioners v. Ld. Sligo*, 5 Ir. C. R. 46.

(1) The 19 & 20 Vict. c. 97, s. 10 (and see s. 11, 12, 13, & 14), provides that no per-
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36. By the 2 & 3 Will. 4, c. 100, a modus or exemption from tithes is established against the king, the Duke of Cornwall, and all *persons not being a corporation sole, or body corporate, whether temporal or spiritual, upon evidence of the render of such modus, or of the enjoyment of the land, without any render of tithes or other matter in lieu thereof, for *thirty years* next before the time of such demand, unless, in the case of a modus, the actual render of tithes or other thing differing from the modus claimed, or, in case of exemption, the render of tithes or other matter in lieu thereof, shall be shown to have taken place at some time prior to such thirty years, or that such payment of modus was made or enjoyment had by agreement by deed or writing; and if such proof in support of the claim shall be extended to the full period of *sixty years* next before the time of such demand, the claim shall be deemed indefeasible, unless it shall be proved that such payment of modus was made or enjoyment had by some agreement by deed or writing.^(g) And in the case of a claim by any archbishop, or other corporation sole, whether spiritual or temporal, every such prescription shall be indefeasible, where the render or enjoyment has been during two successive incumbencies, and for three years after the appointment and institution or induction of a third person thereto: provided that the whole time shall not be less than sixty years, which is to be made up, and also the further period of three years after the appointment and institution or induction of a

(g) S. 1; *Salkeld v. Johnston*, 1 Hare, 469; *Denny v. Devonshire*, 1 Ir. Ch. R. 196, 2 C. B. 749; 2 Excheq. Rep. 256; 657; Sugd. Stat. 155; *Young v. Clare* 1 Mac. & G. 242; *Lord Stamford v. Dunbar*, 13 M. & W. 822; *Sheil v. Incor. Society*, 10 Ir. Eq. R. 411; 2 De G., M. & G. Hall, 17 Ad. & El. N. S. 538; *Fellows v. Clay*, 4 Q. B. 313, as to a lay landowner.

son or persons entitled to any action or suit within the above sections 40, 41, and 42, shall be entitled to any time beyond the period fixed by reason of such person, or some one or more of such persons, being beyond the seas, or by reason of imprisonment. Sections 40, 41, 42, contain no such savings, but the provision in 16 & 17 Vict. c. 113, s. 20, which confines to twenty years actions for rent upon an indenture of demise, or upon bond or other specialty, or upon any judgment, &c., does contain a saving for disabilities, which also is referred to and acted upon by the 19 & 20 Vict. c. 97, s. 10; yet s. 20 of the 16 & 17 Vict. c. 113, provides that nothing in that act contained shall alter the period of limitation of any action given by any statute where the time for bringing such action is or shall be by any statute specially limited.

third person, unless it shall be proved that such render or enjoyment was had by some agreement by deed or writing. *(h)*

37. Every composition for tithes confirmed by decree in England in a suit to which the ordinary, patron, and incumbent were parties, and not since departed from, is made valid in law, and no modus or exemption is within the act, unless the same existed, and had been acted upon at the time of or within one year before the passing of the said act. *(i)*

38. But the periods during which the lands have been held by the tithe-owner or lessee thereof are to be excluded in the computation of time; *(k)* and there is a saving for disabilities, &c., during which time is not to count. *(l)*

39. This act has now but a limited operation; for under a saving in the act of suits to be commenced within a year, most of the disputed * moduses have already been decided upon, and the tithe commutation act contains due provision for the allowance or trial of moduses. *(m)* After a great difference of opinion, it has been decided that the simple fact of enjoyment of the discharge for the prescribed time is all that need be pleaded and proved as an answer to a demand for tithes. *(n)*

40. It still remains to state, shortly, what period of time establishes the claims to light, rights of common and of way, and the like. *(1)* As to light, the access and use of it for any house or building for twenty years without interruption establishes an absolute and indefeasible title to it, notwithstanding any local custom to the contrary, unless the enjoyment was by consent expressly given by deed or writing. *(o)* This, therefore, puts the

(h) S. 1, and s. 4 and 5; Dean and Chap. of Ely v. Cash, 15 M. & W. 697; Dean and Chap. of Ely v. Bliss, 2 De G., M. & G. 459.

(i) S. 2; Thorpe v. Plowden, 17 Q. B. 538.

(k) S. 5.

(l) S. 7.

(m) 6 & 7 W. 4, c. 71, s. 44, 45; Weth-

erell v. Bellwood, 3 Yo. & Col. 319; Wetherell v. Weighill, *Id.* 243.

(n) Salkeld v. Johnston, 1 Hare, 196; 2 C. B. 749; 2 Ex. 256; 1 Mac. & G. 242; Fellowes v. Clay, 4 Q. B. 313; *Ld. Stamford v. Dunbar*, 13 M. & W. 822.

(o) 2 & 3 Will. 4, c. 71, s. 3; *Salters' Company v. Jay*, 3 Q. B. 109; *Truscott v. Mer. Tailor's Co.* 11 Ex. 855; extends to

(1) See the recital. The act extends to claims by the crown or by the duchies of Lancaster and Cornwall.

title simply upon enjoyment by the person claiming the right. But where a house and garden were in the possession always of

custom of London; Sugd. Stat. ch. 1, s. 9, pp. 161, 172; *Frewen v. Phillips*, 11 C. B. N. S. 449; 7 Jur. N. S. 1246; 30 L. J. N. S. 356, Ex. Ch.; [*Washburn Easements* (2d ed.), 574 *et seq.* At p. 583, Mr. Washburn says: "It will be found, it is believed, that in New York, Massachusetts, South Carolina, Maine, Maryland, Pennsylvania, Alabama, and Connecticut, the doctrine of gaining a prescriptive right to light and air by mere length of enjoyment, has been discarded; while the English rule in this respect is retained in Illinois, New Jersey, and Louisiana." See *Ward v. Neal*, 37 Ala. 501; *Mahan v. Brown*, 13 Wend. 261, 263; *Banks v. Amer. Tract Society*, 4 Sandf. Ch. 438; *Parker v. Foote*, 19 Wend. 309; 3 Kent (11th ed.), 448; Gen. Sts. Mass. c. 90, § 34; Rev. Sts. Conn. tit. 29, ch. 1, § 18; *Ingraham v. Hutchinson*, 2 Conn. 584; *Myers v. Gemmel*, 10 Barb. 537; *Hubbard v. Town*, 33 Vt. 295; *Story v. Odin*, 12 Mass. 157; *Grant v. Chase*, 17 Mass. 443; *Atkins v. Chilson*, 7 Met. 403; *Carrig v. Dee*, 14 Gray, 583; *Paine v. Boston*, 4 Allen, 169; *Collier v. Pierce*, 7 Gray, 18; *Pierre v. Fernald*, 26 Maine, 436; *Cherry v. Stein*, 11 Md. 24; *M'Cready v. Thomson*, Dudley, 131; *Gerber v. Grabel*, 16 Ill. 217; *Hay v. Sterrett*, 2 Watts, 331; *Haverstick v. Sipe*, 33 Penn. St. 371; *Maynard v. Esher*, 17 Penn. St. 226; *Napier v. Bulwinkle*, 5 Rich. 311, 324; *Robeson v. Pittenger*, 1 Green Ch. 64; *Durel v. Boisblanc*, 1 La. An. 407; *Ray v. Lynes*, 10 Ala. 63. In *Pierre v. Fernald*, 26 Maine, 436, it was decided, that, where one erects a building upon his own land immediately adjoining the land of another person, and puts out windows overlooking that neighbor's land, he does no more than exercise a legal right, and he cannot by the continuance of such windows without obstruction for more than twenty years acquire any prescriptive rights or easements in favor of ancient lights, which will enable him to sustain an

action against an adjoining owner for erecting fences or buildings, by means of which such lights are obstructed. And it was further held in the above case, that the statute of Maine (Rev. Sts. c. 147, § 14), which provides, that "no person shall acquire any right or privilege of way, air or light, or any other easement, over the land of another by the adverse use or enjoyment thereof, unless such use shall have been continued uninterrupted twenty years," was not designed to create or give any such rights as are therein mentioned, or to determine when, or upon what terms, they had already been acquired, but to prevent their future acquisition without conformity to certain prescribed conditions. See the remarks of Dewey J. upon a similar statute of Massachusetts, in *Atkins v. Chilson*, 7 Met. 403. In *Carrig v. Dee*, 14 Gray, 585, Shaw C. J. said: "The court are of opinion that the plaintiff acquired no right to the use of air and light, coming laterally to his windows over the vacant lot of the defendant, though continued for twenty years before the statute of 1852, c. 144, took effect; and that the windows on hinges, swinging outward, over the defendant's land, did not constitute such an adverse possessory use of the adjoining land as to make any difference in the principle." See *Collier v. Pierce*, 7 Gray, 18; *Paine v. Boston*, 4 Allen, 169. The subject is discussed by Gould J. in *Ingraham v. Hutchinson*, 2 Conn. 584, 597-599, in which he says that he has sometimes suspected, that the English rule respecting ancient lights was originally intended to apply to such windows as projected over the land of the adjoining proprietor, and he suggests that the expression made use of in the English cases, "the windows, or the lights, were *put out*," &c. gives some countenance to this view. In *Parker v. Foote*, 19 Wend. 309, the learned judge who gave the opinion of the court remarked that the English doctrine of an-

the same person, but the garden was held under a yearly tenancy, and the access of light to the house was over the garden, the enjoyment during the tenancy was held not to establish the right in twenty years, for the act converts into a right such an enjoyment only of the access of light over contiguous land as has been had for the whole twenty years *in the character of an easement*, distinct from the enjoyment of the land itself. An interruption (*p*) to operate must have been one submitted to for one year after the party interrupted had notice thereof, and of the person making or authorizing the same to be made. (*q*)

41. In regard to the abandonment of the right to light by non-user, — a man closed his lights for nineteen years, and then reopened them in consequence of the commencement of buildings which would obstruct the windows if open, and his right to do so was established, as the jury found that he had not so closed his lights as *to lead the defendant to incur expense or loss on the reasonable belief that they had been permanently abandoned. (*r*)

42. Rights of common or other profits *à prendre* (except tithes, rents, and services), are not placed upon so favorable a footing.

cient lights "cannot be applied to the growing cities and villages of this country without working the most mischievous consequences. It has never, I think, been deemed a part of our law. Nor do I find that it has been adopted in any of the States." Mr. Chancellor Kent speaks of the English doctrine as "not much relished in this country owing to the rapid changes and improvements in our cities and villages. A prescriptive right, springing up under the narrow limitation in the English law, to prevent obstruction to window lights and views, and prospects; or, on the other hand, to protect a house or garden from being looked in upon by a neighbor, would affect essentially the value of vacant lots, or of lots with feeble and low buildings upon them." See, also, *Ray v. Lynes*, 10 Ala. 63.] As to the right to the free passage of air, see *Webb v. Bird*, 30 L. J. N. S. 384. [See Gen. Sts. Mass. c. 90, § 34.]

(*p*) *Plasterers' Co. v. Parish Clerks' Co.* 6 Ex. 630, which consider.

(*q*) *Hartridge v. Warwick*, 3 Ex. 552; *S. 4*; *Richards v. Fry*, 7 Ad. & El. 688; *Flight v. Thomas*, 11 Ad. & El. 688; 8 Cl. & Fin. 231; *Parker v. Mitchell*, 11 Ad. & El. 788; *Wright v. Williams*, 1 M. & W. 77; see note prefixed to 8 Ad. & El.; *Lowe v. Carpenter*, 6 Ex. 831.

(*r*) *Stokoe v. Singers*, 8 El. & Bl. 31; and as to rights of common, see *Bailey v. Appleyard*, 8 Ad. & El. 161; *Clay v. Thackrah*, 9 C. & P. 47; and as to rights of way, *The Queen v. Chorley*, 12 Ad. & El. N. S. 515; *Ward v. Ward*, 7 Exch. 839; *Lovell v. Smith*, 3 C. B. N. S. 120; [*Washburn Easements* (2d ed.), 645, 646, and cases cited; *Perkins v. Dunham*, 3 Strobh. 224; *Dyer v. Sanford*, 9 Met. 395; *Ballard v. Butler*, 30 Maine, 94; *Angell Watercourses* (6th ed.), §§ 244-246; per Sir W. Page Wood V. C. (*Lord Hatherley*), in *Crossley v. Lightowler*, L. R. 3 Eq. 292, 293.]

But where such right has been actually enjoyed for thirty years (*s*) by any person *claiming right thereto* (*t*) without interruption, (*u*) it cannot be defeated by showing *only* that it was *first* enjoyed at any time prior to such thirty years; but such claim may be defeated in any *other* way by which the same was before the act liable to be defeated; when such has been so enjoyed for sixty years, the right thereto becomes indefeasible, unless it was taken and enjoyed by some agreement expressly made by deed or writing. (*x*)

43. Rights of way or other easement, watercourses, (*x*¹) or the use of water, are placed on the same footing with rights of common, except that the terms of enjoyment are respectively twenty years and forty years, in lieu of thirty years and sixty years. (*y*) As regards interruption of any of these rights, it

(*s*) Carr v. Foster, 3 Q. B. 581.

(*t*) 4 Ad. & El. 376.

(*u*) Arkwright v. Gell, 5 M. & W. 233; Carr v. Foster, 3 Ad. & El. N. S. 581; Sugd. Stat. 169, see Parker v. Mitchell, 11 Ad. & El. 788; Lowe v. Carpenter, 6 Exch. 825; Sugd. Stat. 169, 177.

(*x*) S. 1, Bailey v. Appleyard, 8 Ad. & El. 161; Clay v. Thackrah, 9 C. & P. 47; Mill v. Commissioner of New Forest, 18 C. B. 60, as against the crown.

(*x*¹) [See Angell Watercourses (6th ed.), § 204 *et seq.*

(*y*) S. 2, Tickle v. Brown, 5 Ad. & El. 360; Lawson v. Langley, *Ib.* 800; Payne v. Shedden, 1 Moo. & Ro. 382; Parker v. Mitchell, 10 Ad. & El. 788. [See 2 Greenl. Ev. § 539, & notes; Pollard v. Barnes, 2 Cush. 191; Bolivar Manuf. Co. v. Neponset Manuf. Co. 16 Pick. 241; 2 Cruise Dig. by Mr. Greenleaf, vol. 3, tit. 31, Prescription, ch. 1, § 21, in note; 3 Kent (11th ed.), 441 *et seq.* & notes. The doctrine that easements of every sort may be acquired by an adverse user, for a period of time limited by the statute of limitations for the right of entry upon land, has been adopted and been very frequently applied by the courts of the United States. This has been settled by a long course of judicial decisions, and is founded primarily

on the ancient doctrine of prescriptions, but has finally by the court been made to conform, by analogy, to the statute of limitations applicable to lands, in all substantial particulars, so far as the difference in the subjects will allow. Per Poland C. J. in Tracy v. Atherton, 36 Vt. 510, 511; Barnes v. Haynes, 13 Gray, 188; Blake v. Everett, 1 Allen, 248; Pillsbury v. Moore, 44 Maine, 154; Ricard v. Williams, 7 Wheat. 59; Bowman v. Wathen, 1 How. (U. S.) 189; Hill v. Crosby, 1 Pick. 466; Coolidge v. Learned, 8 Pick. 504; Wallace v. Fletcher, 30 N. H. 446; Angell Watercourses (6th ed.), §§ 208, 209, & notes; Burnham v. Kempton, 44 N. H. 88; Bow v. Allentown, 34 N. H. 374; Winnipiseogee Lake Co. v. Young, 40 N. H. 433; Watkins v. Peck, 13 N. H. 377; Beidelman v. Foulke, 5 Watts, 308; Strickler v. Todd, 10 Serg. & R. 63; Olney v. Fenner, 2 R. I. 211; Belknap v. Trimble, 3 Paige, 577; Townsend v. M'Donald, 2 Kern. 381; Hazard v. Robinson, 3 Mason, 272; Wilson v. Wilson, 4 Dev. 154; Gayetty v. Bethune, 14 Mass. 51, 53; Parker v. Foote, 19 Wend. 309, 315; Corning v. Gould, 16 Wend. 531; Hall v. M'Leod, 2 Met. (Ky.) 98; Washburn Easements (2d ed.), 98 *et seq.* In a late case in Massachusetts, — Edson v. Munsell, 10

means an obstruction by the owner of the *locus in quo*, but it amounts to nothing unless acquiesced in for a year.(z)

44. As regards profits *à prendre* easements and light, time, as we have seen, does not run where the enjoyment is by consent or agreement expressly made or given by deed or writing.(a) And the act provides that time shall not be computed whilst any person otherwise capable of resisting the claim is under such a disability as the act provides for, or tenant for life, or whilst any action or suit has been pending and diligently prosecuted until abated by death, *except only in cases where the right or claim is thereby declared to be indefeasible*.(b) And where the land or water over which any such way or other convenient [*qu.* easement], watercourse, or use of water has been enjoyed or derived, has been held for life or years exceeding three years from the granting thereof; the time of enjoyment during the continuance of such term is to be excluded in the computation of the forty years *if the claim shall, within three years after the end of the term, be resisted by the reversioner.(c)

45. The enjoyment must have been of the easement *as such*, and of right for a continuous period of twenty years *next before* the suit without such interruption as is defined by the act.(c¹)

Allen, 557, 565, — Gray J. said: "The reasons indicated by Bracton, and which controlled the English courts in the construction of the statute of West. 1, and our own in the construction of the statutes of 1786 and 1807, are sufficient to show that since writs of right have been abolished, and writs of entry have been substituted as the proper form of action to recover the freehold, the limitation of writs of entry should be held the legal limit of prescription of incorporeal rights. And the period of twenty years has been assumed and declared by this court to be the term of prescription in many recent cases. *Ashley v. Ashley*, 4 Gray, 200; *Lawrence v. Fairhaven*, 5 Gray, 114; *Sibley v. Ellis*, 11 Gray, 417; *Currier v. Gale*, 3 Allen, 330; *Leonard v. Leonard*, 7 Allen, 277." It is provided by Gen. Sts. Mass. c. 90, § 33, that rights of way and other easements shall not be acquired by adverse use unless

such use shall have continued for twenty years.]

(z) 4 M. & W. 497, s. 4, of statute.

(a) Sect. 1, 2, 3, Monmouthsh. Canal Co. v. Harford, 1 Cro., M. & R. 614, 5 Tyrw. 68.

(b) S. 7; Sir L. Palk v. Skinner, 18 Q. B. 568; Stugd. Stat. 179; 17 Jur. 372.

(c) S. 8; Sir L. Palk v. Skinner, *ubi sup.*; *Ellis v. O'Neill*, 5 Ir. Ch. R. 371; *Linehan v. Deeble*, 9 Ir. C. L. R. 300.

(c¹) [*Washburn Easements* (2d ed.), 140 *et seq.*; *Pollard v. Barnes*, 2 Cush. 191; *Dana v. Valentine*, 5 Met. 13; *Wood v. Kelly*, 30 Maine, 47; *Gerenger v. Summers*, 2 Ired. 229; *Crosby v. Bessey*, 49 Maine, 543; *Branch v. Doane*, 17 Conn. 402, S. C. 18 Conn. 233; *Watt v. Trapp*, 2 Rich. 136; *Cuthbert v. Lawson*, 3 McCord, 195; *Cooper v. Smith*, 9 Serg. & R. 34; *Stein v. Burden*, 24 Ala. 130; *Cotton v. Pocasset Manuf. Co.* 13 Met. 429;

Obstruction or interruption from natural causes over which the party could have no control, will not operate to his prejudice, as in the case of water, or the accident of a dry season.(d) Enjoyment in consequence of unity of possession, so that no person could complain of the user of a road, is not sufficient,(e) and an interval during which by unity of possession there was no user cannot be cut out, but may defeat the claim by breaking the continuity of the enjoyment for the prescribed period before the action brought; therefore an enjoyment from 1800 to 1855 when the action was brought did not prevail, because there was a unity of possession from 1843 to 1855.(f) No presumption is allowed in favor of the claim, upon proof of an exercise or enjoyment for a less period than that required by the statute.(g)

45. Section 7, we have seen in express terms, excludes the time that the person (who is capable of resisting the claim) is *tenant for life*. During the period of a tenancy for life the exercise of an easement will not affect the fee: in order to do that, there must be that period of enjoyment *against* an owner of the fee.(h) But s. 4 and 7, are to be read together, so that the period for a right of common, for example, is to be thirty years' user before the action, excluding in the computation of these thirty years any tenancy for life; that is, thirty years' enjoyment either wholly before the tenancy for life if it be still subsisting, or partly before and partly after, if it be ended.(i)

46. The statute nowhere contains any intimation that there

Winnipiseogee Lake Co. v. Young, 40 N. H. 436; Baldwin v. Calkins, 10 Wend. 167; Wright v. Moore, 38 Ala. 598; Stackpole v. Curtis, 32 Maine, 385; Whittier v. Cocheco Manuf. Co. 9 N. H. 454; Cowell v. Thayer, 5 Met. 253; Ray v. Fletcher, 12 Cush. 200; Marcy v. Shultz, 29 N. Y. 352; Perrin v. Garfield, 37 Vt. 310; Brace v. Yale, 10 Allen, 443; Mertz v. Dorney, 25 Penn. St. 59; Wheeler v. Winn, 53 Penn. St. 122; Armstrong v. Caldwell, 53 Penn. St. 284.]

(d) Hall v. Swift, 4 Bing. N. C. 381; see 3 Ad. & El. N. S. 585; Welcome v. Upton, 6 M. & W. 536; Sugd. Stat. 17.

(e) Olney v. Gardiner, 4 M. & W. 496; Clay v. Shackeray, 2 Moo. & Ro. 244;

Clayton v. Corby, 2 Q. B. 813; Winship v. Hudspeth, 10 Ex. 5.

(f) Battishill v. Reed, 18 C. B. 696; Warburton v. Parke, 2 H. & N. 64; [Esling v. Williams, 10 Penn. St. 126; Ingraham v. Hough, 1 Jones (N. C.), 39.]

(g) S. 6; see 1 Cro., M. & R. 222.

(h) Bright v. Walker, 1 Cro., M. & R. 222, *per Cur.*; Winship v. Hudspeth, 10 Ex. 59; Wilson v. Stanley, 12 Ir. C. L. R. 345; [Washburn Easements (2d ed.), 156-159; Pierre v. Fernald, 26 Maine, 436; Reimer v. Stuber, 20 Penn. St. 458; Wallace v. Fletcher, 30 N. H. 453; Ford v. Flint, 40 Vt. 382.]

(i) Clayton v. Corby, 2 Q. B. 813.

may be different classes of rights, qualified and absolute, valid as to some persons, and invalid as to others. From hence it has been concluded that an enjoyment of twenty years, if it give not a good title against all, gives no good title at all: and it was accordingly held, that as an adverse user of right for twenty years or forty years against a bishop's lessee for life might be disputed by the bishop within three years after the expiration of the lease, it gave no title against the bishop, * and consequently, not binding all, it bound no one, not even the lessee against whom the right had been adversely enjoyed.(*k*)

47. The act relieves a party from the necessity of proving the right from time immemorial, and allows as an equivalent the proof of actual enjoyment for thirty years, so that no presumption is admissible.(*l*)

48. As far as these provisions bear upon title, a purchaser of course should see that the enjoyment of the easement has been not only for the term required by the act, but that the savings or exclusions of time prescribed by the act have not prevented the right from becoming absolute, and a purchaser would therefore have to be satisfied of the nature of the estates of the owners of the land or water over or from which the rights have been enjoyed, and it should be borne in mind that every one of the rights may be defeated by showing that it was enjoyed by agreement in writing; and that the limited bars of thirty years and twenty years are open to impeachment in any other way by which such a claim can be defeated at law than the showing that it was first enjoyed prior to such thirty years or twenty years. Where he buys with a view to building, although adjoining lights are closed, he should ascertain that the owner has abandoned his right to reopen them.(*m*)

(*k*) *Bright v. Walker*, 1 Cro., M. & R. 260; 8 Ad. & El. 161; note *Ib.* following, p. 778.

(*l*) *Bailey v. Appleyard*, 3 Nev. & Pe. (m) *Stokoe v. Singers*, 8 El. & Bl. 31; *supra*, pl. 41.

*SECTION IV.

OF THE NEW LAWS RELATING TO DEEDS, TERMS OF YEARS, POWERS, AND OTHER SUBJECTS.

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| <ol style="list-style-type: none"> 1. 8 & 9 Vict. c. 106; lease for a year: feoffment; leases, assignments, surrenders; exchange, partition; "give," or "grant"; stranger to deed; indenting deed; conveyance of contingencies, &c.; disclaimer by married woman; contingent remainders saved; merged reversion. 2. 8 & 9 Vict. c. 112; merger of attendant terms. 3. Object of the act. 4. 12 & 13 Vict. c. 26; 13 & 14 Vict. c. 17; giving validity to certain void leases under powers. 5. Powers of sale, &c., in court of chancery over settled estates; 19 & 20 Vict. c. 120. 6. 23 & 24 Vict. c. 145; powers to be exercised. 7. 22 & 23 Vict., c. 35; rights of entry. 8. } Relief against forfeiture for non-insur- 9. } ance. | <ol style="list-style-type: none"> 10. Security to purchasers against such forfeiture. 11. Partial operation of release of rent-charge or judgment. 12. Powers by deed, how to be executed. 13. Relief from invalid execution of power of sale; timber. 14. Devises charged with debts or legacies; purchasers.
 <div style="margin-left: 20px;">Descent when purchaser's heirs fail; assignment to assignor and others; registry of crown debts; writs of execution necessary to bind purchasers.</div> 15. }
17. } 16. Punishment for concealment of settlements, &c. 17. 23 & 24 Vict. c. 38; administration of assets; conditions; <i>scintilla juris</i>; bar of claims to personal estate; investment of trust money. 18. 13 & 19 Vict. c. 43; power of infants to make settlements. |
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1. THERE are still several other acts to be referred to. By the first, (a) a lease for a year is rendered unnecessary; (b) a feoffment (unless made under a custom by an infant) is required to be evidenced by deed, (b¹) and a partition and exchange (except

(a) 8 & 9 Vict. c. 106; 4 & 5 Vict. c. 21; 7 & 8 Vict. c. 76, and observe the time of its duration (*Doe v. Moffat*, 15 Q. B. 257). S. 1 of 8 & 9 Vict. s. 8, as to contingent remainders becoming executory devises, was wholly repealed; and s. 9 as to conveyances of legal estates in mortgagees, and s. 10 as to receipts of trustees, were not reenacted; as to the latter, see *infra*.

(b) Sect. 2.

(b¹) [Generally in the United States conveyances of real estate derive their efficacy mainly from the statutes of each State, regulating that subject. In Massachusetts, conveyances of real estate are made by deed executed, acknowledged, and recorded

in manner required by the statute, without any other act or ceremony whatsoever. Such is the mode of conveyance in many other States. Other States have adopted different modes of conveyance, and different operations are attributed to them. See 2 Cruise Dig. by Mr. Greenleaf, vol. 4, tit. 32, Deed, ch. 4, § 1, note; 4 Kent, lecture, 67; Perry Trusts, § 299, & notes. Attending witnesses are not, by the common law or by the statutes of Massachusetts, necessary to the validity of a deed for the conveyance of land. A deed for that purpose, if duly delivered, though not acknowledged nor recorded, passes the estate presently, and is a valid conveyance, as against the grantor and his heirs

of copyholds), and a lease required by law to be in writing,(c) and an assignment of a chattel interest (not being copyhold), and a surrender in writing of an interest in any hereditament (not being copyhold,) and not being an interest which might by law have been created without writing, are made void unless made by deed,(d) but this does not extend to Ireland, as far as relates to a release or a surrender. The word release receives its natural construction, and therefore, even in Ireland, a lease must be by deed.(e) But a void lease under this statute because not made by deed, yet so far regulates the holding as to create a tenancy from year to year, determinable by half a * year's notice, and if the tenancy endure for the term attempted to be created, the tenant can be evicted at the end of the term without any notice to quit.(f) And a court of equity has treated it as an agreement, and enforced a specific performance of it;(g) and even at law, although, but for the statute, the instrument might have operated as a lease, yet if it contain an agreement

and devisees. *Dole v. Thurlow*, 12 Met. 157; *Thacher v. Phinney*, 7 Gray, 149; see 4 Kent (11th ed.), 458; *Robertson v. Kennedy*, 1 Stewart, 245. In some of the States a certain number of witnesses is required. 4 Kent (11th ed.), 457. In all of the States, deeds and conveyances of land are required to be recorded upon previous acknowledgment or proof. 4 Kent (11th ed.), 456. But if not recorded, they are good, and pass the title as against the grantor and his heirs and devisees, and mere strangers and trespassers; and they are void only as to subsequent *bonâ fide* purchasers and mortgagees, whose deeds shall be first recorded. 4 Kent (11th ed.), 456; *Strickland v. McCormick*, 14 Missou. 166; *Coney v. Cummings*, 12 Louis. 748. Referring to the mode of conveyance by feoffment, Mr. Chancellor Kent says: "Nothing can be more concise and more perfect in its parts than the ancient charter of feoffment. It resembles the short and plain forms now commonly used in the New England States." 4 Kent (11th ed.), 480. In the United States the delivery of the deed, duly executed, will

generally pass the seisin, where there is no adverse possession, and in some of the States where there is an adverse possession. 2 Cruise Dig. by Mr. Greenleaf, vol. 4, tit. 32, Deed, ch. 4, § 1, in note, § 9, in note. The conveyance by feoffment, with livery of seisin, has long since become obsolete in England, and though it has been, in the United States, a lawful mode of conveyance, it has not been used in practice. Our conveyances have been either under the statute of uses, or short deeds of conveyance, in the nature of the ancient feoffment, and made effectual on being duly recorded, without the ceremony of livery. 4 Kent (11th ed.), 489.]

(c) *Stratton v. Pettit*, 16 C. B. 420; *Drury v. Macnamara*, 5 El. & Bl. 612.

(d) Sect. 3; *Cannan or Tanner v. Hartley*, 9 C. B. 634.

(e) *Gilman v. Crossly*, 7 Ir. C. L. R. 557.

(f) *Tress v. Savage*, 4 El. & Bl. 36.

(g) *Parker v. Taswell*, 2 De G. & J. 559.

for a regular lease, an action will lie upon the contract.^(h) A feoffment is no longer to have a tortious operation; and exchange or a partition is not to imply any condition in law; the word *give* or *grant* is not to imply any covenant in law,^(h¹) except so far as by force of any act of parliament it may imply a covenant.⁽ⁱ⁾(1) Under an indenture, an immediate estate and the benefit of a condition or covenant may be taken, although the taker be not named a party, and a deed purporting to be an indenture need not to be indented.^(k) These several provisions refer to deeds executed after the 1st of October, 1845. Contingent interests, possibilities coupled with an interest, and rights of entry,⁽²⁾ may be conveyed by deed, and a married woman may disclaim by deed,^(l) which provisions are to operate after the 1st of October, 1845. And a contingent remainder existing at any time after the 31st of December, 1844, is to be, and if created before the passing of the act, is to be deemed to have been capable of taking effect, notwithstanding the determination by forfeiture, surrender, or merger, of any preceding estate of freehold, in the same manner as if such determination had not happened; ^(m) and finally, when the reversion on a lease shall, after the 1st of October, 1845, be surrendered, or merge, the next estate is to be deemed the reversion expectant on the same lease, to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion as but for the surrender or merger would have subsisted; ⁽ⁿ⁾ and this provision is retrospective.^(o)

(h) *Bond v. Rosling*, 8 Jur. N. S. 78.

(h¹) [See *Vanderkarr v. Vanderkarr*, 11 John. 122; *Kent v. Welch*, 7 John. 258; *Grannis v. Clark*, 8 Cowen, 36; *Dow v. Lewis*, 4 Gray, 468. In Maine the word "give" does not import a covenant of warranty. *Allen v. Sayward*, 5 Greenl. 227. The words "grant, bargain, and sell" were held in *Knepper v. Kurtz*, 58 Penn. St. 480, to imply only a covenant that the grantor (not his predecessors) has done no act and created no incumbrance

whereby the estate granted by him may be defeated.]

(i) Sect. 4.

(k) Sect. 5. [See 2 Cruise Dig. by Mr. Greenleaf, vol. 4, tit. 32, Deed, ch. 1, § 19, note, ch. 21, § 1, in note; 4 Kent (11th ed.), 461.]

(l) Sect. 6, 7.

(m) Sect. 8.

(n) Sect. 9; compare the provisions

(o) *Upton v. Townend*, 17 C. B. 50.

(1) Upon a parol demise there is no implied contract for a good title, although there is for quiet enjoyment; *Bandy v. Cartwright*, 8 Ex. 913.

(2) A right of entry for a condition broken is not assignable under this statute, *semble*, *Hunt v. Bishop*, 8 Ex. 675; *Hunt v. Remnant*, 9 Ex. 635.

2. The second act (*p*) provides that every satisfied term of years, which either by *express declaration* or by construction at law, shall, upon the 31st of December, 1845, be attendant upon the inheritance of reversion of any lands, shall on that day absolutely cease and determine, but with an exception, that every such term which shall *be so attendant by express declaration, although made to cease, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim, and demand, as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with after the said 31st of December, 1845, and shall for the purpose of such protection be considered in every court of law and equity to be a subsisting term. (*q*) And it is further provided, that every term of years then subsisting, or thereafter to be created, becoming satisfied after the 31st December, 1845, and which, either by express declaration or by construction of law, shall after that day become attendant upon the inheritance, shall immediately upon the same becoming so attendant absolutely cease and determine. (*r*)

3. The object of this act appears to be to merge all attendant terms, but to preserve to the persons entitled the protection which a term would have afforded to them, where, upon the 31st December, 1845, it was attendant by express declaration. But even this is a limited protection, for it gives not such protection as a further assignment of it, for a purchaser, would confer, but such protection as it would have afforded if it had continued to subsist, but had not been assigned or dealt with after the 31st December, 1845. This protection will, of course, extend to a new purchaser, although the term assigned to attend was left undisturbed. (*s*) It is settled that, under the act, a satisfied term

with those of the 7 & 8 Vict. c. 76, and keep in view the period during which the latter will operate.

(*p*) 8 & 9 Vict. c. 112.

(*q*) Sect. 1.

(*r*) Sect. 2; Garrard v. Tuck, 8 C. B. 231; see 8 & 9 Vict. c. 119, for the shortening conveyances and covenants; and 8

& 9 Vict. c. 124, for the like object as to leases.

(*s*) Freer v. Hesse, 17 Jur. 177, 4 De G., M. & G. 495; Shaw v. Johnson, 7 Jur. N. S. 1005, 1 Drew. & Sm. 412; see Sugd. Stat. 282, n.; Corry v. Cremorne, 12 Ir. Ch. Rep. 136, *infra*, ch. 16, pl. 18; as to dower, see and consider *In re Sleeman*, 4 Ir. Ch. R. 563.

attendant by express declaration on 31st December, 1845, ceased on that day,^(t) although its protection continues.

4. The third act, with a supplemental act,^(u) makes a *bond fide* lease under a power upon which there has been an entry by the lessee, but which is invalid by reason of some deviation from the terms of the power, operate as a binding contract, save as to any necessary variation to comply with the power, but the lessee is bound to accept a confirmation of the lease by the reversioner as it stands. A memorandum of confirmation followed by acceptance of rent is to give validity to a lease under a power. And leases granted prematurely under powers are rendered valid where the lessor's estate continues after the time when such a lease might have been granted under the power.

* 5. Powers of selling settled estates are given by the 19 & 20 Vict. c. 120, which came into operation on the 1st of November, 1856.^(x) The powers extend to every settlement, however created,^(y) and whenever created,^(z) and to estates of every tenure,^(a) except inalienable estates tail created by act of parliament, or where the reversion is in the crown.^(b) *The power is vested in the court of chancery*, and extends to timber (not being ornamental); ^(c) but of course, if the estate is sold, all the timber may be sold with it. Due provisions are made as to sales of land for building at a rent,^(d) for the exception of mines,^(e) and for the dedication of land for roads, gardens, and the like.^(f) The conveyance is to be executed by such persons, and it is to have such operation as the court shall direct.^(g) Where an estate in mortgage was devised in strict settlement, with a power of sale in trustees, and after an order under the act for certain persons to convey, but before the conveyance to the purchaser, the mortgagee conveyed his legal estate to the trustees of the

(t) *Doe v. Price*, 16 M. & W. 603; see 15 C. B. 552; *Cottrell v. Hughes*, 15 C. B. 532; *Doe v. Moultsdale*, 16 M. & W. 689; see 15 C. B. 550; *Doe v. Jones*, 13 Q. B. 774; Sugd. Stat. 276; *infra*. ed.) 720; Sugd. Stat. (2d. ed.) 288; *Curt v. Middleton*, 7 Jur. N. S. 151.

(z) Sect. 44.
(a) Sect. 2.
(b) Sect. 42.

(u) 12 & 13 Vict. c. 26 (suspended by 12 & 13 Vict. c. 110); 13 & 14 Vict. c. 17; Sugd. Stat. c. 6, for the exceptions, &c.
(c) Sect. 11.
(d) Sect. 12.
(e) Sect. 13.

(x) Sect. 46; 21 & 22 Vict. c. 77; *In re Burden's Will*, 5 Jur. N. S. 1378.
(f) Sect. 14.
(g) Sect. 15.

(y) Sect. 1, 26, 27; Sugd. Pow. (8th

settlement to the uses; it was held that the concurrence of the trustees in the conveyance to the purchaser was not necessary.^(h) The court may authorize a sale under the act to the extent of limited interests created by the settlement; and, with the concurrence of the persons entitled to the interests not bound by the settlement, a sale may be made of the fee. Trustees with a power of sale can bind all persons claiming under their trust.⁽ⁱ⁾ The act provides for the necessary consents,^(k) and notices of application,^(l) and of the exercise of the powers.^(m) The money is to be paid to trustees approved of by the court, or into court, and is to be applied in the redemption of land tax, or of any incumbrance on any part of the settled estates, or the purchase of other estates, to be settled in the same manner as the estate sold was settled, or the payment to any person absolutely entitled.⁽ⁿ⁾ In the mean time the money is to be invested, and the interest paid to the person who would have been entitled to the rents of any property purchased.^(o) The act is not to extend to settlements against the expressed or implied intention, &c., of the parties, but the court may exercise the powers, although there are like powers in the settlement.^(p) After completion of any sale purporting to be in pursuance of the act, it is not to be invalidated, * except as to persons whose consent or concurrence ought to have been obtained, but was not.^(q) But a purchaser, before completion of the purchase, may object if the order for sale is not authorized by the act.^(r) Mines may be sold separately from the land.^(s) This was so decided, and all such past dispositions — extending to sales, exchanges, partitions, or enfranchisement by any trust or other person intended to be made in exercise of any trustee or power authorizing such sales, &c., and not forbidding the reservation of minerals, are rendered valid,^(t) and every trustee and other person then or thereafter to become authorized to dispose of land by way of sale, ex-

(h) *Eyre v. Sanders*, 28 L. J. N. S. 439.

(i) *Grey v. Jenkins*, 26 Beav. 351.

(k) Sect. 16, 17, 18; *Grey v. Jenkins*, 26 Beav. 351.

(l) Sect. 19, 20.

(m) Sect. 22.

(n) Sect. 23, 24.

(o) Sect. 25.

(p) Sect. 26; *Re Thompson's Settled Est.* John. 418.

(q) Sect. 28.

(r) *Re Thompson's Settled Est.* John. 418; see *Eyre v. Sanders*, 28 L. J. N. S. 439.

(s) *Re Mullin's Settled Est.* 3 Giff. 126.

(t) 25 & 26 Vict. c. 108, s. 1, 2,

change, partition, or enfranchisement may, unless forbidden by the instrument creating the trust or power, so dispose of such land with an exception or reservation of any minerals, and with or without rights and powers of or incidental to the working, getting, or carrying away of such minerals, or may (unless forbidden as aforesaid) dispose of by way of sale, exchange, or partition the minerals with or without such rights or powers separately from the residue of the land, and in either case without prejudice to any future exercise of the authority with respect to the excepted minerals or (as the case may be) the undisposed of land; but this enactment will not enable any such disposition as aforesaid without the previous sanction of the court of chancery, to be obtained on petition in a summary way of the trustee or other person authorized as aforesaid, which sanction once obtained will extend to the enabling from time to time of any disposition within the enactment of any part or parts of the land comprised in the order to be made on such petition, without the necessity of any further or other application to the court. The act does not extend to Ireland or Scotland. To return to the principal act, 19 & 20 Vict. c. 120, costs and orders by the court are provided for.^(u) Provisions are also made for binding infants, lunatics,^(x) bankrupts, and insolvents.^(y) And married women are enabled to bind themselves, notwithstanding any restraint on alienation by them, and without incurring any forfeiture,^(z) and although under age.^(a) But no party can be compelled to apply or to consent.^(b) Incumbrances to any extent, by whomsoever created, are no impediment to the exercise of the power of sale, but the incumbrancers are not to be affected unless they concur.^(c) Where the estate for life, for example, is deeply incumbered, and the incumbrancers do not concur, it will be found difficult, having regard to the incumbrances and the * interests of the remainder-men, to effect a sale with justice to all parties. The act also contains powers to tenants for life, &c., of any settled estate, unless the settlement

(u) Sect. 29, 30, 31.

(z) Sect. 37, 38; *In re Forster's Sett.* 3(x) See Gen. Orders of 6 August, 1857; Jur. N. S. 833; see 20 & 21 Vict. c. 57.
Gen. Orders, 1860, Order XLI., III., Rules 14-25.

(a) Sect. 39.

(y) Sect. 36.

(b) Sect. 40.

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(c) Sect. 41.

shall otherwise direct, and also to tenants by the curtesy or in dower, or in right of a wife seised in fee of an unsettled estate, *without any application to the court of chancery*, to lease for twenty-one years with incidental powers.(d) The court of chancery has power given to it to confer powers of leasing on trustees of settlements, with powers to them to appoint new trustees. The power of leasing may now be exercised without any further sanction, unless it shall appear to the court that such sanction ought to be required.(e)

6. The 23 & 24 Vict. c. 145, goes a step further; it came into operation on the 28th August, 1860, but it does not operate retrospectively, nor against the express declaration of the parties; (f) it actually provides powers to be exercised under settlements and wills. In the case of powers of sale it confers all necessary authorities specially to act under it which extend to exchanges, where exchanges are authorized by the power of sale, and it contains a provision as to renewing renewable leaseholds.(g) In the case of mortgages after specified defaults, the act authorizes a sale with all necessary directions, with power to insure the property, and appoint a receiver.(h) There are also powers to give receipts, to apply the income of an infant's property for his maintenance, and the common power of appointing new trustees, with another power to give receipts, and an authority to executors to compound debts.(i)

7. The 22 & 23 Vict. c. 35, has amended the law of property in many instances, and afforded further relief to trustees, to which latter provisions it is only necessary here to refer.(k) The provisions as to property law are, 1. A license from a landlord to a tenant to alien, &c., is, unless otherwise expressed, not to destroy a general condition or right of reëntry.(l) 2. A license to one of several lessees, or a license as to part of the property, is not to extend to the other lessees or to the other portions of the

(d) 19 & 20 Vict. c. 120, 21 & 22 Vict. c. 77; Sugd. Stat. 290; *In re Chambers* 28 Beav. 653; see *White v. Leeson*, 5 Jur. N. S. 1361.

(e) 25 & 26 Vict. an act to amend the settled estates act, 1856 not yet printed by the queen's printers.

(f) Sect. 34, 32.

(g) Parts I. & IV.

(h) Part II.

(i) Part III.

(k) Sect. 26-52; and see 23 & 24 Vict. c. 38, sect. 9-12, 14.

(l) Sect. 1; for interpretation of terms, see s. 25; Sugd. Stat. (2d. ed.) 309.

property.(m) 3. And where any actual waiver of the benefit of any covenant or condition in any lease on the part of any lessor, or his heirs, executors, administrators, or assigns, shall be proved to have taken place after the passing of this act in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such * covenant or condition, unless an intention to that effect shall appear.(m¹)(1) 4. Where the reversion upon a lease is severed, and the rent is legally apportioned, the assignee of each part of the reversion is to have the benefit of the original powers of reëntry.(n)

8. Equity is empowered to relieve against a breach of a covenant to insure against fire where no damage by fire has happened, and the breach has been committed through accident or mistake, or otherwise without fraud or gross negligence, and there is a proper insurance on foot when the application is made.(o) But relief can only be granted once to the same person, and none can be granted where a forfeiture has already been waived out of court in his favor.(p)

9. An informal insurance by a lessee or mortgagor is to inure to the benefit of the person entitled to the benefit of a regular insurance.(q)

10. The next provision requires to be stated fully : (r) " Where, on the *bonâ fide* purchase after the passing of the act of a leasehold interest under a lease containing a covenant on the part of the lessee to insure against loss or damage by fire, the purchaser is furnished with the written receipt of the person entitled to receive the rent, or his agent, for the last payment of rent accrued due before the completion of the purchase, and there is

(m) Sect. 2.

Vict. c. 126, s. 2, 3; see *Page v. Bennett*,

(m¹) [See *Grigg v. Landis*, 6 C. E. 6 Jur. N. S. 419.
Green, 494.]

(p) Sect. 6.

(n) Sect. 3.

(q) Sect. 7.

(o) Sect. 4. This power has been extended to the common law courts, 23 & 24

(r) Sect. 8; and see s. 9 as to all the above provisions.

(1) This provision was struck out of the bill in the Commons under a misapprehension, but was passed next year, and is sect. 6 of the 23 & 24 Vict. c. 38.

subsisting at the time of the completion of the purchase an insurance in conformity with the covenant, the purchaser, or any person claiming under him, is not to be subject to any liability, by way of forfeiture or damages or otherwise, in respect of any breach of the covenant committed at any time before the completion of the purchase, of which the purchaser had not notice before the completion of the purchase; but this provision is not to take away any remedy which the lessor or his legal representatives may have against the lessee or his legal representatives for breach of covenant."

11. The next provisions are, that a release of part of the estate from a rentcharge shall have only a partial operation.^(s) And the like rule is established as to a release from a judgment of part of the estate charged.^(t)

12. Then follow some enactments as to powers. A power to be executed by deed *may* now be exercised by any deed in the common form in the presence of and attested by two or more witnesses, although required to be executed and attested with some additional or other form of execution or attestation or solemnity; ^(t¹) but this does not *extend to consents required, or any act to be performed having no relation to the mode of executing and attesting the instrument.^(u)

13. The next provision will not admit of curtailment: ^(x) "Where under a power of sale a *bonâ fide* sale is made of an estate with the timber thereon, or any other articles attached thereto, and the tenant for life, or any other party to the transaction, is by mistake allowed to receive for his own benefit a portion of the purchase money as the value of the timber or other articles, the court of chancery may, upon any bill or claim or application in a summary way, as the case may require or permit, declare that upon payment by the purchaser, or the claimant under him, of the full value of the timber and articles at the time of sale, with such interest thereon as the court shall direct, and the settlement of the principal moneys and interest under the direction of the court upon such parties as in the opinion of

^(s) Sect. 10.

^(t) Sect. 11.

^(t¹) [See 4 Kent (11th ed.), 330-334; Ladd v. Ladd, 8 How. (U. S.) 10.]

^(u) Sect. 12; Sugd. Pow. (8th ed.) 137, 147; Sugd. Stat. (2d ed.) 314.

^(x) Sect. 13.

the court, shall be entitled thereto, the said sale ought to be established; and upon such payment and settlement being made accordingly, the court may declare that the said sale is valid, and thereupon the legal estate shall vest and go in like manner as if the power had been duly executed, and the costs of the said application as between solicitor and client shall be paid by the purchaser or the claimant under him."

14. It is further provided, that where, by any will coming into operation after the passing of the act,^(y) real estate is charged with debts or any legacy, and devised to trustees for the testator's whole estate or interest, without any express provision for raising the charge, the trustees may raise it by sale or mortgage, or partly in one mode and partly in the other. These powers extend to trustees by survivorship, descent, or devise, or appointed under any power in the will or by the court of chancery.^(z) And where, in such a case, the whole estate or interest shall not be vested in trustees, the executors for the time being are empowered to sell or mortgage; but it is not rendered unnecessary to get in any outstanding legal estate.^(a) Purchasers or mortgagees are not bound to inquire whether these powers have been duly and correctly exercised by the persons acting in virtue of them.^(b) These provisions do not extend to a devise in fee, or in tail, or for the testator's whole estate and interest charged with debts or legacies, nor do they affect the power of any such devisees to sell or mortgage as they could by law then do.^(c)

15. The 3 & 4 Will. 4, c. 106, is amended by providing that where there is a total failure of heirs of the purchaser, or where any land * shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such ancestor, the land is to descend, and the descent to be traced from the person last entitled to the land as if he had been the purchaser thereof.^(d) So that the maternal heirs of the son of an illegitimate father will inherit lands purchased by the latter, and they will no longer escheat. Any person may assign chattels real and other personal property directly to himself and

(y) Sect. 14, 13 August, 1859.

(z) Sect. 15.

(a) Sect. 16.

(b) Sect. 17.

(c) Sect. 18; see ch. 18, *infra*; and the cases there quoted.

(d) Sect. 19, 20; *supra*, s. 1.

other persons; two deeds are no longer necessary.^(e) The former provisions for reregistry of judgments are now applied to crown debts in order to bind purchasers, mortgagees, or creditors becoming such after the 31st December, 1859.^(f) And by a later act,^(g) no judgments, statutes, and recognizances entered up after the passing of the act are to bind purchasers or mortgagees (whether with or without notice), unless execution has been issued and registered as thereby directed before the execution of the conveyance or mortgage, and the payment of the purchase or mortgage money. And to bind them the execution must be executed and put in force within three calendar months from the time of registry. And purchasers are no longer bound to see to the application of the purchase money.^(h)

16. There is yet another provision which it is most important should be generally known, and which will not bear abridgment.⁽ⁱ⁾ Any seller or mortgagor of land, or of any chattels real or personal, or *choses in action* conveyed or assigned to a purchaser,⁽¹⁾ or the solicitor or agent of any such seller or mortgagor, who shall after the passing of the act conceal any settlement, deed, will, or other instrument material to the title or any incumbrance from the purchaser,⁽¹⁾ or falsify any pedigree upon which the title does or may depend, in order to induce him to accept the title offered or produced to him, with intent in any of such cases to defraud, will be guilty of a misdemeanor, and being found guilty will be liable, at the discretion of the court, to suffer such punishment by fine or imprisonment for any time not exceeding two years, with or without hard labor or by both, as the court shall award, and will also be liable to an action for damages at the suit of the purchaser or mortgagee, or those claiming under the purchaser or mortgagee, for any loss sustained by them, or either or any of them in consequence of the

(e) Sect. 21.

(h) 22 & 23 Vict. c. 35, s. 23; ch. 18,

(f) Sect. 22.

infra.

(g) 23 & 24 Vict. c. 38; *infra*; and see 23 & 24 Vict. c. 115, for entering up satisfaction on judgments.

(i) Sect. 24; see 24 & 25 Vict. c. 96, s. 28-30.

(1) This clause was extended in the Commons to a mortgagor, but in the two passages above the words "or mortgagee," are omitted. These words are now supplied by the 8th section of 23 & 24 Vict. c. 38.

settlement, deed, will, or other instruments or incumbrance so concealed, or of any claim made by any person under such pedigree, but whose *right was concealed by the falsification of such pedigree; and in estimating such damages, where the estate shall be recovered from such purchaser or mortgagee, or from those claiming under the purchaser or mortgagee, regard shall be had to any expenditure by them or either or any of them in improvements on the land; but no prosecution for any offence included in this section against any seller or mortgagor, or any solicitor or agent, shall be commenced without the sanction of the attorney general, or if that office be vacant, of the solicitor general; and no such sanction is to be given without such previous notice of the application for leave to prosecute to the person intended to be prosecuted, as the attorney general or the solicitor general (as the case may be) shall direct.

17. The 23 & 24 Vict. c. 38, may be considered a supplemental act to the 22 & 23 Vict. c. 35. 1. It protects, as we have seen, prospectively, purchasers and mortgagees against judgments, unless writs of execution have been issued therein and registered, and such execution must be put in force within three calendar months from the registration, and such writs are to be reregistered.^(k) 2. It protects executors and administrators in the administration of assets against judgments not registered or not reregistered.^(l) 3. It confines a waiver of a condition to the particular instance, as we have before seen.^(m) 4. It abolishes *scintilla juris*.⁽ⁿ⁾ (1) 5. It extends, as we have also seen, the fortieth section of 3 & 4 Will. 4, c. 27, to claims against the personal estates of intestates,^(o) and lastly, it contains important provisions regarding trustees and the investment of trust money.^(p)

(k) Sect. 1, 2, *infra*, ch. 13, s. 1.

(l) Sect. 3 & 4.

(m) Sect. 6.

(n) Sect. 7.

(o) Sect. 13; and see s. 14.

(p) Sect. 10-12; Sugd. Stat. 323; *In re*

(1) The writer inserted the following clause in his bill, which passed the Lords, but was struck out in the Commons. It requires no explanation: "Where by any instrument the estate created to serve the uses thereby declared or authorized to be declared by any power therein contained shall not be commensurate with such uses, and the grantor or creator of the estate shall have had an estate commensurate with the uses, the uses shall take effect according to the intention apparent on the face of the instrument."

18. It may be useful shortly to refer to the 18 & 19 Vict. c. 43, extended to Ireland by the 23 & 24 Vict. c. 38, which enables infants — males not under twenty, females not under seventeen — to make settlements with the approbation of the court of chancery of their real and personal estates, but not where the power is forbidden to be exercised during infancy; and acts done by a tenant in tail under the act will be void if he die under twenty-one.(q)

* SECTION V.

OF ACQUIRING AND REGISTERING AN INDEFEASIBLE TITLE.

- I. 25 & 26 Vict. ch. 53 & ch. 67, for enabling the declaration of an indefeasible title, and the registration thereof; observations on the acts. Provisions of the acts; 1st ch. 53.*
1. Registry of title; who may apply.
 2. Examination of title.
 3. Preparations for registration.
 4. Advertisements; notices.
 5. When registry is to take place; four registers. What is to be registered.
 6. Powers of registrar.
 7. Title acquired — indefeasible upon sale or mortgage.
 8. Registration without an indefeasible title.
 9. Leaseholds may be registered.
 10. What are not incumbrances.
 11. Entry of conditions on register.
 12. Registration of title acquired under ch. 67.
 13. Once on the register, every act or devotion must be registered; power to remove title from the registry.
 14. Caveats; cautions; injunctions.
 15. Court of chancery may sell with indefeasible title.
 16. Modes of transfer; unregistered deeds void against subsequently registered deeds of purchasers for value; operation of deposit of land certificates.
 17. Land certificates.
 18. Court of chancery to have the powers of trustee act of 1850, &c.
 19. Land registry office; registries of Middlesex and York.
 20. Application to the court of chancery; appeals; disabilities; costs.
 21. Punishment for false statements, &c.
 22. Registry, metropolitan.
- II. Provisions of ch. 67.*
23. Court of chancery may confer an indefeasible title under ch. 67.
 24. Who may apply for such a title.
 25. Interference of registrar under ch. 53.
 26. When the title may be investigated.
 27. When the indefeasible title is to be declared.
 28. Notices; objections; declaration of title; appeal. The title may be registered under ch. 53.
 29. Indefeasible title is in favor of purchasers.
 30. Appeals.
 31. Where purchase money shall be deemed trust money.
 32. Disabilities. — Penalties.
 - 33, 34. Observations on the bill for shortening the time of limitation in favor of purchasers, which passed the Lords, but was dropped in the Commons.

Langford's trusts, 8 Jur. N. S. 114; *In re Warde*, 2 J. & H. 191; *Hume v. Richardson*, 8 Jur. N. S. 686.

(q) See *In re M'Clintock*, 10 Ir. Ch. R. 469.

I. OUR attention must now be directed to the acts just passed for enabling persons to obtain an indefeasible title.^(a) The first, the government bill, is at once a bill for that purpose, and for a general registration of assurances when the title is once upon the record; the registration will be attended with great expense both to the public and to the individuals, with a full disclosure on the record of every man's dealing with his estate, and of the operation of law upon his title, accompanied with new and extensive powers in the new court; all going far beyond anything proposed in the various bills for registering assurances, and yet all men were agreed that a general registration of assurances was a great evil. The last bill having that object passed the Lords after a division against it upon the writer's motion, but was rejected in the Commons, and a royal * commission was issued to consider the subject, under which the commissioners unanimously reported against a general registry, but recommended a registry of title with an owner in fee always on the record, for which purpose a nominal owner, or, in other words, a trustee, must constantly have been named. This would not have been endured; still that did not render it advisable to establish a general registry. The new act keeps out of sight the amount of the expenses which will attend registration, and the difficulties which will occur when properties become divided and boundaries are altered. As the bill was introduced, owners of property whose rights were defeated by the operation of the new law, were to be indemnified out of the consolidated fund; and in order to recoup the public, the persons registering were to pay a sum which included the premium of assurance of their titles. These provisions were struck out of the bill in the select committee of the Lords, but the clauses as to the fees were still left in the bill, leaving the amount and the alteration of them from time to time wholly to the registrar, with the sanction of the lord chancellor, but the amounts are to be *ad valorem* where there is a sale, upon the value of the land as determined by the amount of the purchase money; where there is not a sale, upon the value of the land to be ascertained in such manner as may be directed by general order. This provision cannot fail to create great expense and annoyance. The bill has however one

(a) 25 & 26 Vict. ch. 53, & ch. 67.

great merit, it is not compulsory, so that it will be a man's own act if he think fit to apply to the registrar. It will be seen that an owner applying for a declaration of title, does not establish his title against any adverse claimant whilst he retains the estate, although it enables him to make an indefeasible title to a purchaser, or a purchaser may at once obtain such a title with the seller's concurrence; but such a title cannot be obtained, as we shall see, without great expense and considerable delay, and there may be appeals from the registrar to the court of chancery and from the court of chancery to the House of Lords; and at the risk of the title being, according to the old law term, damned, in case it should be rejected; and the owner perhaps exposed to attacks by persons who had no knowledge of their right to the property. No man can safely apply to this tribunal who does not first ascertain that he has such a title as an unwilling purchaser could be compelled to accept; with this view he must incur as much expense for solicitors, counsel, abstracts, searches, and proofs, as would be necessary upon a common sale with a good title. If the report be favorable to him, what can he want more? he cannot have more than a good title. He may remember the Italian epitaph, "I was well, wished to be better, took physic and died." If he do go to the court, he must, besides encountering many additional and expensive formalities, once more pay for the *reëxamination of his title by new solicitors and new counsel. But it is said when on the registry, it will not be necessary on future sales to prove the old title; that may be a saving to purchasers from him if they resell, but from that he will derive no advantage. There are powerful reasons why a man with a good title should not have recourse to the court, and if he have a bad title, his application to it could afford him no relief, but might inflict great loss upon him. It has been called a poor man's bill, but it is no more a poor man's registry bill than the London Tavern is his dining place. With these preliminary remarks, I shall proceed to state shortly the provisions of the bills; and first as to the lord chancellor's bill, which extends to England only.(b) But I am bound to refer to the declaration made upon a solemn occasion in favor of the bill since the foregoing observations were written. The queen's

(b) 25 & 26 Vict. c. 53.

speech on the prorogation, read by the lord chancellor, contained this passage, without any qualification: "The act for rendering more easy the transfer of land will add to the value of real property, will make titles more simple and secure, and will diminish the expense attending purchases and sales." The beneficial operation of the act is therefore no longer doubtful.

1. The first step is registry of the title. The registry is confined to estates of freehold tenure, and leasehold estates in freehold lands. Application may be made by owners in fee simple, or who have the power of acquiring the same, or who have the power of appointing the same; trustees for sale of the fee; the owner of the first estate of freehold, and first vested estate of inheritance; any purchaser of the fee where his contract empowers him so to do, or the vendor consents; finally, any person authorized by the court of chancery to make such application. Application may be made, although the estate of the applicant may be subject to incumbrances.(c)

2. The title is to be examined by the registrar and conveying counsel of the court, and none is to be accepted, unless such as a court of equity would hold to be a valid marketable title,(d) and any doubt may be referred to a judge of the court of chancery.(e)

3. If the title appear to be good, then the registrar is to prepare for registration, from materials to be furnished by the applicants, a description of the property, the estates, &c., of any persons in the land, and the incumbrances on it. Questions on these statements may be referred to a judge of the court of chancery.(f) Mines are to be specially provided for,(g) and the registrar is to ascertain the *identity of the lands, and their quantities and boundaries; and a map is to be deposited as part of the description.(h)(1)

4. The next step is for the registrar to publicly advertise his intention to register at a period not less than three months, and the notice is to contain a copy of the description of the land,

(c) Sect. 4.

(d) Sect. 5.

(e) Sect. 6.

(f) Sect. 7, 8.

(g) Sect. 9.

(h) Sect. 10.

(1) It was finally agreed before the passing of the act that a general registry could not succeed without additional public maps, at an expense of 1,000,000*l.* The private maps are manifestly a substitute, at the expense of the owners.

and the names and descriptions of the applicants for registration; and a copy of this notice is to be served upon every adjoining occupier, and a large class of other persons ⁽ⁱ⁾(1) who may object to the registration; upon which the registrar is to decide, subject to an appeal. ^(k)

5. If the applicant establishes his right, then the registry is to take place. There are four registries: 1. The register of the estate; 2. The record of the title; 3. The register of incumbrances; and 4. The registry of deeds, &c., which is to contain printed copies of all instruments; and thus an indefeasible title is to be acquired. The register of the estate is to distinguish the estate by a number, and to refer to the record of title. In that record, under the same number, the estates and interests in the land are to be entered, with the names and descriptions of the persons entitled thereto. The third register of incumbrances speaks for itself; they are to be registered under the same number. ^(l) The fourth register will contain, as we have seen, copies of all the instruments. If the scheme were to succeed, the bringing together in a government office copies of men's settlements would greatly assist the chancellor of the exchequer, whom nothing escapes, in collecting the succession duty. Unlike other registries, no one is to inspect them but the owners of the estates or of the incumbrances, or their solicitors or agents, except under an order of the court of chancery. ^(m) Transmissions by will or by descent are to be registered, with a power to the court of chancery in case the proper person cannot be ascertained, or of any doubt, dispute, or litigation, touching the ownership of the deceased proprietor, to appoint a person to be registered as the representative of the * estate or interest. ⁽ⁿ⁾ The assignee of a bankrupt is to be registered in his place, ^(o) and

⁽ⁱ⁾ Sect. 11, 12.

^(m) Sect. 15, 137.

^(k) Sect. 13.

⁽ⁿ⁾ Sect. 78-86.

^(l) Sect. 14.

^(o) Sect. 80.

(1) And the person (if any) to whom such occupier pays rent, and on the lord of the manor in any case in which the lands are situate within or held of any manor, and also on every person not having already had notice of the application, who shall appear to have or claim any estate or interest in or right over the land or any part thereof, and on such other persons as under the special circumstances of each case shall be deemed necessary. The notice must state also the place, time, and manner, at and in which any party may be heard to show cause against such registration.

memorials of descents, deaths, marriages, and of the evidence thereof, and such other memorials as the registrar shall deem necessary, are to be registered^(p) So that no act or event can take place or happen in regard to a registered proprietor which must not forthwith be put on the register. The execution of the original deed, will, or instrument, proposed to be registered, and the exactness of every copy or memorial delivered for registration are to be proved in such manner as the registrar shall from time to time require.

6. Extensive powers are given to the registrar in making up and continuing the record of title. Questions of boundary may be left open, and questions of construction, and of the rights of parties, may be referred to a judge of the court of chancery, to whom full powers are given.^(q)

7. The act then declares that, subject to any conditions and charges and rights reserved, the persons originally and from time to time named in the record of title, shall, *for the purposes of any sale, mortgage, or contract, for valuable consideration by such persons*, have an indefeasible title against all persons, and also against the crown.^(r) Costs against the applicant are carefully provided for.^(s)

8. The act then authorizes the registration without an indefeasible title, where the applicant, or some person under whom he claims, has been in the actual enjoyment or receipt of the rents and profits of the fee simple continuously and without interruption for the previous ten years. And provision is made in due time for transferring the land to the register of estates, with an indefeasible title, with its necessary consequences.^(t)

9. Leaseholds, with fifty years unexpired, or two lives still subsisting, where demised for lives, may be registered in like manner as freeholds.^(u)

10. The act describes what shall not be deemed incumbrances, land tax, &c., &c.; and right of way and the like; and leases, or agreements for leases, not exceeding twenty-one years with actual occupation.^(x)

(p) Sect. 83.

(q) Sect. 16-19.

(r) Sect. 20, 21, 22, 23.

(s) Sect. 24.

(t) Sect. 25; and see sect. 58.

(u) Sect. 26.

(x) Sect. 27.

11. Conditions may be entered on the register, *e. g.* not to build, which may be dealt with by the court of chancery.(y)

12. Where any judicial declaration of title to any land shall be made by the court of chancery under the act to which our attention will next be drawn, the person obtaining the same may avail *himself of the powers before mentioned in order to obtain an indefeasible title.(z)

13. When once upon the register, every interest in the land is to be entered on the record of title, or register of incumbrances;(a) but the estates of registered proprietors are to remain subject to the existing law, and may be dealt with, and will be transmissible accordingly.(b) All persons interested may remove the estate from the register.(c)

14. A system of caveats is then established,(d) and likewise of cautions,(e) with power to the court of chancery to issue injunctions.(f)

15. And the court of chancery is authorized to make sales of land with an indefeasible title upon application of any of the persons who are empowered to apply for registration of title with the like guards,(g) and with special directions in regard to the purchase money;(h) and this is carried to a great extent. And compensation is provided for parties aggrieved by any order of the court vesting the land in a purchaser, or where any person has been registered with an indefeasible title under a vesting order, for any injury they may have sustained, out of any purchase money that may be remaining in court.(i)

16. The act then provides for the modes of transfer of registered land, either under the forms in the act, or by indorsement on the land certificate, or by deposit of the certificate, or by the usual modes.(k) But no unregistered estate or interest, contract, or engagement, for the registration whereof provision is made by the act, is to prevail against the title of a subsequent purchaser for valuable consideration duly registered;(l) and no equitable

(y) Sect. 29, 93.

(z) Sect. 31, *infra*, pl. 22.

(a) Sect. 32.

(b) Sect. 33, 74.

(c) Sect. 34.

(d) Sect. 35-40.

(e) Sect. 96-100.

(f) Sect. 101-104.

(g) Sect. 41-62. So upon sales under the 20 Vict. c. 120, s. 49.

(h) Sect. 54, 55, 90.

(i) Sect. 60.

(k) Part III. s. 63-67.

(l) Sect. 73. [See *ante*, 495, note (b¹).]

mortgage or lien on registered land can any longer be created by a deposit of title deeds; but a deposit of the land certificate is for the purpose of creating a lien on the estate or interest of the depositor to have the same effect as a deposit of the title deeds would have had before the passing of the act.^(m) Parties may attend at the registry office, and execute a conveyance.⁽ⁿ⁾

17. The act establishes a system of land certificates with special provisions.^(o) The receipt by the registrar of a deed or instrument in writing, or a copy, is to be deemed a due entry thereof on the register.^(p)

* 18. The court of chancery, for the purpose of authorizing or compelling a transfer of any registered land or charge, may exercise all such powers as are vested in it by the trustee act, 1850, or by any act amending the same in relation to transfers of stock.^(q)

19. The act then establishes an office of land registry, with extensive powers; and the registries in Middlesex and York are to cease to be applicable to any land situate in the said counties so soon as the same land has been put upon the register under the provisions of the present act, and whilst it remains thereon.^(r) This sort of shifting registry will probably lead to much inconvenience.

20. Applications to the court of chancery may be made by summons in chambers, with ample powers in the judge. A right of appeal lies from any order by a judge to the court of appeal in chancery, and from that court to the House of Lords.^(s) The statute provides for the acts of married women and for persons under disability, the loss of land certificates, and the granting of new ones; ^(t) ample provisions are, of course, made for costs, and a new charge may be thrown on settled estates by a power in the act, where registration is made on the application of parties who cannot make a valid charge on the fee simple, for the court of chancery to declare that the costs and expenses of registration may be raised by a mortgage of the fee simple, "and the same shall be charged accordingly."^(u)

(m) Sect. 74.

(n) Sect. 64.

(o) Sect. 71-73.

(p) Sect. 76.

(q) Sect. 95.

(r) Sect. 104.

(s) Sect. 34. See sect. 13, 14.

(t) Sect. 108-133; and see s. 126, giving to general orders the force of an act of parliament.

(u) Sect. 132.

21. False statements, or suppression or concealment, by principal or agent, with a view to obtain registration, is made a misdemeanor, with severe punishment; and the act or thing done or obtained by means of such fraud is made void, except as against a purchaser for valuable consideration without notice.(x)

22. The scheme is a metropolitan one; but the framers of the act, no doubt, if it should succeed, contemplate its extension by district registries throughout the realm.

23. It will be observed that the act refers to another act under which an indefeasible title may be obtained, and enables such a title to be registered under the provisions before referred to.(y) The act thus referred to is 25 & 26 Vict. c. 67, and singular as it may seem that two acts should be passed simultaneously for the same object, yet so it was. This act, however, is confined to the obtaining an indefeasible title, which is to be accomplished through the instrumentality of the court of chancery. It was accompanied by another * bill which sought to establish a sort of domestic registry by indorsement of subsequent deeds on prior ones; it was dropped in the House of Commons in consequence of the opposition of the government; it appeared to the writer that it would not have worked well. Persons, however, as we have seen, who obtain a declaration of title under the act which did pass, ch. 67, are at liberty to have it registered under the act already so fully explained.

24. The act now under consideration, which does not apply to copyholds,(z) enables claimants in fee, or claiming to have a power to acquire the fee, either absolutely or subject to any incumbrances, estates, or rights vested or contingent; and every person entitled to apply for the registration of an indefeasible title to the registrar appointed under chapter 53 of the same session, to apply to the court of chancery by petition in a summary way for a declaration of title.(a)

25. By an extraordinary amendment in the Commons power is

(x) Sect. 105; and see sect. 138, 139, as to other frauds on the register.

(z) Sect. 4.

(a) Sect. 1-3.

(y) *Supra*, pl. 12.

given to the court to require that the registrar appointed under chapter 53 shall be served with notice of such petition; and the registrar is thereupon to be made a party to and attend the proceedings in such petition, and the costs thereby incurred are to be paid by the petitioner.(b)

26. The court, on being satisfied, at the hearing of the petition, that the petitioner has proved such a possession, and stated such a title as, if established, would entitle him to a declaration of title, is to order the title to be investigated in the same way as if the petitioner had obtained a decree for a specific performance of an agreement for the sale of the land for the estate claimed. If the title on the investigation is such as an unwilling purchaser would not be compelled to accept, the petition is to be dismissed, subject to an appeal to the court of appeal in chancery, and finally to the House of Lords.(c)

27. If, on such investigation, the title is such as the court would have compelled an unwilling purchaser to accept, the court is, upon security being given for costs, and upon certain affidavits having been made as to documents of title, to make an order *nisi*, that on some day, not less than three months from the date of the order, a declaration shall be made establishing the petitioner's title.(d)

28. The petitioner is then to give notice of the order by public advertisement, and any person may be heard against the proposed declaration of title; (e) the declaration may be qualified, or may reserve the rights of any person, or class of persons, or the court may refuse to make any declaration of title; (f) and rights under *lost deeds may be reserved.(g) And finally, if the court is satisfied, the declaration of title may be made subject to any restrictions, reservations, or qualifications deemed necessary,(h) but is not subject to be set aside for informality.(i) Every such declaration of title may, at the option of the person obtaining the same, be registered as an indefeasible title under chapter 53; (k) when the land is registered under it, it is to be

(b) Sect. 5.

(c) Sect. 6, 19.

(d) Sect. 7, 8, 9, 10.

(e) Sect. 11, 12.

(f) Sect. 13.

(g) Sect. 14.

(h) Sect. 15.

(i) Sect. 20.

(k) Sect. 21, 27.

subject to the provisions of the same act.^(l) This should not be lost sight of. Six months are allowed for an appeal from the declaration, and six months are allowed from the making of an order on the appeal, to appeal from it to the House of Lords.^(m) When the final declaration is obtained, the claimant will obtain a certificate or certificates of his title,⁽ⁿ⁾ and may subsequently obtain separate certificates;^(o) and in case of loss of any certificate, a duplicate may be obtained.^(p)

29. Such final declaration of title shall, *in favor of any person thereafter deriving title as a purchaser for valuable consideration* of the land, or any part or interest therein, by, from, through, or under the person whose title had been so declared, be deemed to have correctly declared the same; but, save as aforesaid, such declaration is to have no force or effect whatever as to the title of the land comprised therein.^(q) The declaration, as in the first mentioned act, is not to affect land tax, &c., or easements, &c.^(r)

30. Any person aggrieved may, *at any time* after such declaration of title, apply to have it recalled or varied, upon which the court is to act; and may direct the registry thereof, if made, to be cancelled, but not so as to affect the title of any prior purchaser for valuable consideration under the declaration of title;^(s) but these proceedings are, like the others, subject to appeal.^(t)

31. The act then recites, that it may happen that at the time of making such declaration of title there may be estates, rights, or interests in the land which may not be saved by the declaration, and the persons entitled thereto may be damnified by the subsequent alienation of the land for valuable consideration, and enacts that all money received by the person so alienating shall be deemed to have been received by him in trust to invest the same in the purchase of lands to be settled to the uses, &c., to which the land stood limited at the time of such alienation; with a proviso to protect trustees who receive money on alienation.^(u)

(l) Sect. 30.

(m) Sect. 16-18.

(n) Sect. 22-25.

(o) Sect. 26.

(p) Sect. 28.

(q) Sect. 24.

(r) Sect. 29.

(s) Sect. 31, 32.

(t) Sect. 33.

(u) Sect. 35.

32. The act provides for notices to be given to persons interested, * and requires a register to be kept wherein claimants to any interest in land may enter their names and address, with the name of the county, parish, and township in which such land is situated, and the court is not to make any order under the act, unless proper notice of the application for the order shall have been given to such persons; it also provides, like the first act, for costs,(v) and for the acts of married women, and for persons under disabilities;(x) and imposes severe penalties on false statements, or suppression of deeds, or for fraudulent acts in relation to the register.(y) The act is to come into operation on the 1st January, 1863.(z) The schedule, which will be found in the Appendix to this volume, contains *important* directions in regard to the various steps to obtain a declaration under the act, which may be rescinded or altered by the lord chancellor with advice.

33. With the two acts which we have just considered, a bill was sent down to the Commons to which reference has already been made, and of which a copy is in the Appendix. Parliament, in the beginning of the queen's reign, dealt powerfully with adverse claims. The real property commissioners considered that the length of abstracts was a growing evil which called loudly for a remedy, but their measures have in no degree lessened the evil. One object of this bill was to provide an effectual remedy. Purchasers were, by the new legislation, deprived of the short bar provided by fines with proclamations, and of the operation of warranties, descents cast, discontinuance and feoffments, and even the protection of terms attendant on the inheritance was taken away: they require further protection. As the law stands, the period of limitation starts from the time when the right of action accrues. Generally speaking, this is quite right; but the rule operates so severely against a purchaser where a strict settlement has been suppressed or concealed, that, in order to guard against it, upon every purchase in England the abstract of title must go back sixty years, by which the landed proprietors of the realm are constantly put to enormous and useless expense. And yet the real property commissioners

(v) Sect. 34.

(y) Sect. 44-46.

(x) Sect. 36, 37.

(z) Sect. 40.

stated in their report — what I can corroborate from my own experience — that, from the inquiries they had made, the exceptions in favor of disabilities did not appear to be of much practical importance to persons in whose favor they were provided. They had reason to think that the rights of persons laboring under disabilities were by no means usually neglected. The truth is, that suppression of a settlement on a sale is of rare occurrence: the sale of the fee of an estate is soon known — the acts of a purchaser of a life estate are altogether different from those of an owner in fee: — if a settlement exists, it must be known * to the family and to solicitors; and if it has long been suppressed, and no one knows of its existence but the man who has suppressed it, the preservation of the right under it to be used against an innocent purchaser, ought to be within reasonable limits. The law as it stands operates thus: Suppose a settlement to be to the settlor for life, with remainder to his first and other sons in tail, and that he has no son for a long period, and then, suppressing the settlement, he sells the estate as owner of the fee, and lives for forty or fifty years afterwards, and leaves a son. Now the son's right does not accrue until his father's death, and from that period only does time run against his claim, so that the purchaser's title remains in danger for a very long and uncertain period. The bill in question proposed, in favor of every *bonâ fide* purchaser without notice, to establish twenty years as a bar, *reckoning from the conveyance to him*; five years further were to be allowed for disabilities, but thirty years were to be a final bar. Yet future estates of persons under disabilities were carefully guarded *during the twenty years*, by authorizing the persons entitled, or others in case of disabilities, or of unborn issue, to save their rights by an application to the court of chancery. A tenant for life fraudulently selling the fee was to be treated as a trustee of the purchase money. Principals and agents concealing a settlement had already been made liable to severe punishment by an act for which the writer is responsible: this was a great safeguard.

34. Now this bill, so carefully framed, after having been read a second time in the Commons, was proposed by the government to be amended to an extent which would have rendered it valueless, and therefore the framer of it preferred that it should

be allowed to drop. Purchasers consequently remain still liable to the danger of concealed settlements, and abstracts still travel over sixty years. It appears to have escaped the attention of the learned persons who opposed the bill as going too far, that they had but a few days previously passed a bill which *at once* cuts up, root and branch, every claim under a suppressed settlement; and yet in the sales where that bill would thus operate, there is no purchaser whose interest it is to sift the title thoroughly, so as to lead to the discovery of any suppressed settlement. Under the bill which they passed, a great wrong might be inflicted without a remedy; whilst, under the rejected bill, purchasers would have been duly protected, claimants against them under suppressed settlements would have been allowed ample opportunity of enforcing their claims, and the daily wanton expenses of long abstracts of title would have been put an end to. But the writer never felt surprise at a man's straining at a gnat after having swallowed a camel.

* CHAPTER XIII.

OF SEARCHING FOR INCUMBRANCES AND OF RELIEF AGAINST INCUMBRANCES.

SECTION I.

OF SEARCHING FOR INCUMBRANCES.

1. Judgments must be stated in abstracts.
2. Under the old law, judgments after payment of purchase money not binding on purchaser.
3. *Forth v. Duke of Norfolk*.
4. Operation of contract on judgments under old law.
5. Judgments bound estate contracted for.
6. Mortgagee without notice buying equity of redemption not bound by judgments.
7. Trust estate, how far liable: trust for sale; purchaser not liable: *Lodge v. Lyseley*; *Foster v. Blackstone*.
8. Purchaser without notice protected by a term.
9. After-purchased lands bound.
10. Judgments defeated by an appointment.
11. Judgment creditors under a decree.
12. Old judgments: equity of redemption of a term not bound.
13. Purchaser with notice bound by undocketed judgment.
14. Moiety only bound, unless two judgments of the same term.
15. Bind the whole estate, legal or equitable, and copyholds and general powers. — An actual charge and bind issue and others who could be barred.
16. Palatine courts registry: inferior courts.
17. Decrees, &c., equal to judgment.
18. Operation of act.
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20. So an annuity.
21. And a mortgage: mortgages paid off.
22. And binds surviving joint tenant.
23. Operation on powers.
24. Judgment creditors of purchaser before conveyance.
25. Operation on estates tail and remainder.
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28. To bind a purchaser must be registered: nature of registry.
29. 23 & 24 Vict. c. 38: writ of execution necessary to bind a purchaser.
30. And reregistered every five years: explained.
31. *Shaw v. Neale*; *Beavan v. Lord Oxford*.
32. Notice not binding of judgment not registered or reregistered.
33. Effect of notice under 1 & 2 Vict. c. 110, and 2 Vict. c. 11. — Purchaser protected. — And under 3 & 4 Vict. c. 82.
34. Operation of statutes. — When registered judgments bind. — Judgment after payment of purchase money still not binding. — Effect of contract.
35. Purchaser without notice, a mortgagee protected.
36. Trust estate, how far liable.
37. Trust for sale, purchaser not liable.
38. Purchaser without notice protected by a prior legal estate.
39. Judgments not defeated by an appointment: purchaser.
40. Leaseholds: equity of redemption.
41. Copyholds.

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| <p>42. Search for judgments.
 43. Although a register county.
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 45. Purchasers before the 1st of October, 1838, protected.
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 66. What sales binding on crown.
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 71. Search for substitution for fines and recoveries deeds.
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 73. Wills registered or unregistered.—Leaseholds.
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 78. Solicitor's liability for neglect.
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1. Now that a judgment is a specific charge on the land, the practice in regard to the abstract must be altered.^(a) A seller's attorney can no longer safely keep back a list of judgments, but is bound to set it forth on the abstract, like every other charge upon the property.

2. By the law before the new acts, where any judgment was entered up after the purchase money, being an adequate consideration, was actually paid, equity relieved the purchaser against it, although it was entered up previously to the execution of the conveyance; the vendor being in equity only a trustee for the purchaser,^(a¹) and a judgment being merely a general security, and not a specific lien on the land, and this equity prevailed even where the judgment creditor had not notice of the contract.^(b)

3. Where a man gave, 1. a warrant of attorney to enter up judgment to one, and then, 2. mortgaged to another in fee, and then, 3. contracted to sell to a purchaser without notice, and 4. a judgment was afterwards entered up on the warrant of attorney,

(a) *Richards v. Barton*, 1 Esp. 268.

(a¹) [See *ante*, 175, notes.]

(b) *Nels. C. R.* 184; *Finch v. Earl of Winchelsea*, 1 P. Wms. 278; 10 Mod. 468; 11 Vin. Ab. 118; *Kennedy v. Daly*, 1 Sch. & Lef. 373; *Prior v. Penpraze*, 4 Pri. 99; *Llo. & Go. t. S.* 262; *Whitworth*

v. Gaugain, 1 Cra. & Phi. 325; 3 Hare, 416; 1 Phil. 728; *Abbot v. Stratton*, 3 J. & L. 603; *Langton v. Horton*, 1 Hare, 549; *Leake v. Leake*, 5 Ir. E. R. 361; *Massey v. Batwell*, *ib.* 382; *Trye v. Earl of Aldborough*, 1 Ir. C. R. 666.

and then, 5. the seller and the mortgagee in fee conveyed the fee to the purchaser without notice, and a part of the purchase money was secured to the seller by a legal term of years, and then, 6. notice of the judgment was given to the purchaser, whilst part of the money was still unpaid; but the purchaser paid off the mortgage and took a surrender of the term [which appears from the papers in the cause], Leach V. C. * held that, as the greater part of the purchase money was paid, and the rest secured by the term when the notice was given, the judgment creditor had no remedy in equity against the fee. The purchaser was then the mortgagor for the term. The notice, therefore, was nothing more than notice to the mortgagor that a person to whom he had granted a legal term, by way of mortgage, was indebted on judgment; but a judgment is, at law, no lien upon a legal term; and when the interest of the debtor is legal, a judgment is no lien in equity. Notwithstanding this judgment, the debtor could well assign his legal term at his pleasure. If there was no lien upon the term in the hands of the debtor, there could be no lien upon the term in the hands of his assignee, unless he bought with notice.(c)

4. The operation of a contract upon judgments, before the new law, seems to have stood thus: a contract for sale would prevail over a subsequent judgment creditor in equity,(d) but the creditor would have a legal right under his judgment, and he would have an equitable right to so much of the purchase money required to pay his debt as remained unpaid; to the extent of the money paid before his judgment he would be bound in equity. But if the purchaser paid any part of the purchase money to the exclusion of the judgment creditor, after he had notice of the judgment, he would still be bound to that extent by the debt.(e)

5. As a purchaser under the contract was in equity owner of the estate, of course *his* judgments bound it as well before as after he had completed his purchase; (f) and this is still the law.

(c) *Forth v. Duke of Norfolk*, 4 Mad. 505.

(d) 4 Sim. 75.

(e) 4 Mad. 505.

(f) *Baldwin v. Belcher*, 1 J. & L. 18; *Walcott v. Lynch*, 13 Ir. E. R. 199; *In re Cooke*, 6 Ir. C. R. 430.

6. A purchaser who at the time of his contract was seised of the legal estate as a mortgagee, was not bound by judgments entered up subsequently to the mortgage, for an equity of redemption was not within the clause of the statute of frauds, which will shortly come under our consideration, and it was therefore not extendible,^(g) and as the purchaser by the contract acquired equal equity with the judgment creditor, and had already got the legal estate, his title could not be impeached. But it was otherwise if the purchaser had notice of the judgments, for the judgment was a lien upon the estate in equity,^(h) and conferred a right on the creditor to redeem a prior mortgage or other incumbrance; ⁽ⁱ⁾ therefore, a mortgagee purchasing the equity of redemption was bound by judgments of which he * had notice, although they were entered up subsequently to the mortgage.^(k)

7. This doctrine prevailed before the statute of frauds; and by

(g) *Lyster v. Dolland*, 1 Ves. jr. 431; 3 Bro. C. C. 478; *Burdon v. Kennedy*, 3 Atk. 739; *Scott v. Scholey*, 8 East, 467; *Metcalf v. Scholey*, 2 New R. 461; *Doe v. Evans*, 1 Cr. & Me. 450; *Gore v. Bowser*, 3 Sm. & Gif. 1. [The doctrine has very extensively prevailed in the United States, that an equity of redemption may be taken and sold on an execution at law. 4 Kent (11th ed.), 160, 161; *Ingersoll v. Sawyer*, 2 Pick. 276; *Van Ness v. Hyatt*, 13 Peters (U. S.), 294; *Hobart v. Frisbie*, 5 Conn. 592; *Ford v. Philpot*, 5 Harr. & J. 313; *Kelly v. Beers*, 12 Mass. 388, 389; *Carpenter v. First Parish in Sutton*, 7 Pick. 49; per *Richardson C. J.* in *Pritchard v. Brown*, 4 N. H. 397, 402; *Kittredge v. Bellows*, 4 N. H. 424; *Kelly v. Burnham*, 9 N. H. 20; *Collins v. Gibson*, 5 Vt. 243; *Bagley v. Bailey*, 16 Maine, 151; *Garro v. Thompson*, 7 Watts, 416; *M'Whorter v. Huling*, 3 Dana, 349; *Hunter v. Hunter*, 1 Walker (Miss.), 144; *Livermore v. Boutelle*, 11 Gray, 217; *Verry v. Richardson*, 5 Allen, 107; *Grover v. Flye*, 5 Allen, 543; *Capen v. Doty*, 13 Allen, 262. But it has been held that the mortgagee cannot cause a sale to be made, on execution, of the

equity of redemption for the purpose of paying or extinguishing the debt secured by the mortgage. See *Atkins v. Sawyer*, 1 Pick. 351; *Goring v. Shreeve*, 7 Dana, 66; *Tice v. Annin*, 2 John. Ch. 125; *Schnell v. Schroder*, 1 Bailey Eq. 334. But see *Porter v. King*, 1 Greenl. 297. A mortgagee may attach and levy on the mortgaged land for a debt not secured by the mortgage. *Cushing v. Hurd*, 4 Pick. 253. Where an equity of redemption is sold under an execution the purchaser takes such interest as the defendant on execution had. *Crow v. Tinsley*, 6 Dana, 402; *Hartshorne v. Hartshorne*, 1 Green Ch. 348. See, further, on the subject of levying upon or selling an equity of redemption under an execution, *White v. Bond*, 16 Mass. 400; *Warren v. Childs*, 11 Mass. 222; *Steward v. Allen*, 5 Greenl. 103; *Coombs v. Jordan*, 3 Bland, 284.]

(h) *Churchill v. Grove*, Nels. C. R. 89; 1 Ch. C. 35.

(i) 2 Ch. R. 180; *Anon.* 2 Vent. 361, No. 2.

(k) *Greswold v. Marsham*, 2 Ch. C. 170; *Crisp v. Heath*, 7 Vin. 52, (E.) pl. 2; *Tunstall v. Trappes*, 2 Sim. 286.

the tenth section of that statute execution might be delivered upon any judgment, statute, or recognizance, of all such lands, &c., as any other person or persons should be seised or possessed of in trust for him against whom execution was sued, in the same manner as if he had been seised of such lands, &c., of such estate as they be seised of in trust for him *at the time of the execution sued*, and should be held discharged of the incumbrances of the trustee. But if a trustee had conveyed the lands before execution sued, though he was seised in trust for the defendant at the time of the judgment, the lands could not be taken in execution.^(l) The statute only extended to clear and simple trusts for the benefit of the debtor.^(l) Therefore, a trustee of a term of years for securing an annuity, and subject thereto for the grantor, was not a trustee within the statute.^(m) Where an estate was conveyed to trustees to sell, and pay debts, &c., and to pay the surplus of the moneys to the grantor, and the receipts of the trustees were made discharges to the purchasers, the general opinion was, that the purchaser was not bound by any subsequent judgments of which he had even express notice. And in *Lodge v. Lyseley*,⁽ⁿ⁾ a father tenant for life and his son tenant in tail in remainder, joined in conveying the estate to trustees to sell, and to pay 30,000*l.*, part of the purchase money, to the father, and the residue to the son. The trustees' receipts were made discharges, and they contracted to sell the estate, and judgments were afterwards entered up against the father. The V. C. held that the purchaser could not be affected by the judgments.

(l) *Hunt v. Coles*, Com. 226; *Higgins v. York Build. Co.* 2 Atk. 137; *Harris v. Pugh*, 4 Bing. 335; 12 Mo. 577; *Johns v. French*, 1 Hog. 450; *Pratt v. Colt*, 2 Free. 139, *contra*, as to a trust estate descended (1673), for which the statute provides a remedy; see 3 & 4 Will. 4, c. 104; *Steele v. Phillips*, Beat. 193.

(l) [In Connecticut the interest of a *cestui que trust* in real estate is subject to the lien of attachment and the levy of execution. *Davenport v. Lacon*, 17 Conn. 278. So it was held in *Pritchard v. Brown*, 4 N. H. 397, that the interest of a *cestui que trust* in land will pass by the extent of an execution upon the land as his estate. The decision was, however,

based upon what was said to be a long course of practice and usage in the State of New Hampshire, in regard to equities of redemption. "And we are of opinion," say the court, "that the interest of the *cestui que trust* must stand on the same ground as that of the mortgagor, and while the right of a mortgagor shall be held to pass by an extent upon the land as his property, the interest of the *cestui que trust* must be held to pass in the same way."']

(m) *Doe v. Greenhill*, 4 B. & Ald. 684; *Nulkes v. Day*, 10 Sim. 48; *Digby v. Irvine*, 6 Ir. E. R. 149.

(n) 4 Sim. 70.

His notion was, that it was of the essence of the trusts, which the son, as the purchaser, had a right to have performed, that the trustees should convey the legal estate and give receipts for the purchase money. In the later case of *Foster v. Blackstone*,^(o) a father conveyed his real estate to trustees to sell and pay off charges created by the son, and pay the surplus arising from sales in the father's lifetime to him, and the surplus arising after his decease to the son, and to stand seised of the estates which should remain unsold in trust for the father for life, and after his * decease for the son in fee. An annuitant of the son's, who had a judgment against him, claimed a lien on moneys arising from sales made after the father's death, but the master of the rolls disallowed the claim.

8. As a mortgagee seised or possessed of a legal estate would not have been bound by judgments, so a purchaser, who obtained an assignment of a legal subsisting term of years to attend the inheritance, could protect himself against judgments, &c., if notice could not be proved on him or his agent. But a purchaser seldom relied upon a term, because notice may be inferred from very slight circumstances. It remained undecided whether an attendant term could be seised under the tenth section of the statute of frauds, but the purchaser was clearly safe where he had procured an assignment of the term *before execution sued*,^(p) so that the question was not very important as far as regarded purchasers. Of course a man could not protect himself against his own judgment by an attendant term, for the fee would be extendible,^(q) and the trustee of the term would become a trustee for the judgment creditor. But the statute did not enable the judgment creditor to take in execution an equity of redemption or a trust in a leasehold. Every attendant term is at law a chattel real, — a term in gross, and therefore no such term could be taken in execution for the debt of the *cestui que trust*; but a creditor having sued out execution, could establish his right to

(o) 1 My. & Ke. 297; see *Alexander v. Crosby*, 6 Ir. E. R. 513; 1 J. & L. 666; *Bayley B.* thought it might; *Doe v. Browne v. Cavendish*, 1 J. & L. 606; and *Evans*, 1 Cr. & Me. 450; the facts of (since 1 & 2 Vict. c. 110) *Robinson v. Hedger*, 13 Jur. 846; *Drummond v. Tracy*, John. 608.

(p) *Doe v. Helder*, 2 B. & Ald. 782; that case are not distinctly stated.

(q) *Sir J. Harrington v. Garraway*, 2 Ro. Ab. 472 (P.) pl. 11.

an equitable interest in a leasehold, and this remains unaltered. (r) It should be borne in mind that, although a leasehold for years might be extended on an *eligiti*, if it was in the possession of the defendant *at the time the execution is awarded*, (s) yet it was settled long before the statute of Charles II., that a sale of chattels was good after judgment, although not after execution awarded: (t) so that as to a term of years the command to the sheriff on an *elegiti* did not overreach the sale in the same manner as it did in the case of a freehold estate.

9. Judgments bound after-purchased lands, and consequently affected such lands even in the hands of a purchaser. (u)

10. Where by the operation of the conveyance, — as in the instance of an appointment under a general power by a person having the fee * in default of appointment, — the estate vested in the seller was divested, and the fee was vested in the purchaser under the power, the judgments entered up against the seller ceased to bind the estate at law; (x) and in equity also, although the purchaser bought with notice, (y) and a portion of the purchase money was set aside as an indemnity, (z) but crown debts could not thus be defeated by the execution of a power. (a)

11. Although the court of chancery sold the estate, yet the purchaser was bound to ascertain that all the judgment creditors having legal liens had come in under the decree, for any one who did not might enforce his judgment against the purchaser although he had paid the whole of his purchase money into court. Copyhold estates were not liable to be extended on judgments.

12. Old judgments existing against a former owner of a leasehold estate upon which it did not appear that execution had

(r) *Gore v. Bowser*, 3 Sm. & Gif. 1; see pl. 16, *inf.*

(s) *Sir Gerard Fleetwood's case*, 8 Co. 171; consider 31 Ass. p. 6; 38 Ass. p. 4; see 2 Inst. 395; *Gilb. Ex.* 33, 35.

(t) *Fleetwood's case*, 8 Co. 171; 1 Fitz. Ab. Execution, pl. 108; 2 Ro. Ab. 157; *Wilson v. Wormol*, Godb. 161, pl. 226; *Shirley v. Watts*, 3 Atk. 200.

(u) *Sir John de Moleyn's case*, 30 E. 3, 24 a; 1 Ro. Ab. 892, pl. 14, 16; 42 E. 3, 11 a; 42 Ass. pl. 17; 2 H. 4, 8 b, pl. 42; 14 a, pl. 6; 2 Ro. Ab. 472 (P.), pl. 3; *Shep. Prac. Couns.* 305; *Hickford v.*

Machin, Winch, 84, per Jones J., *Brace v. Duchess of Marlborough*, 2d Res. 2 P. Wms. 492. [See 4 Kent (11th ed.), 435, 436; *Calhoun v. Snider*, 6 Binney, 135; *Stow v. Tiffit*, 15 John. 464.]

(x) *Doe v. Jones*, 10 B. & C. 459; *Hickson v. Collis*, 1 J. & L. 94; *In re Phillips*, 4 Ir. Ch. R. 584.

(y) *Tunstall v. Trappes*, 3 Sim. 286; *Eaton v. Sanxter*, 6 Sim. 517.

(z) *Skeeles v. Shearley*, 8 Sim. 153; 3 My. & Cra. 112.

(a) *Regina v. Ellis*, 19 L. J. N. S. Ex.

issued, were not considered an objection to a seller's title.(b) Where only an equity of redemption of a term was purchased, the purchaser could not be affected by even an execution lodged of which he had no notice, for such an interest was not extendible under the statute of frauds, and the mere delivery of the writ to the sheriff was not implied notice to a purchaser.(c)

13. But although a judgment was not duly docketed, and therefore void against a purchaser, yet if the purchaser had notice of it he was bound by it.(d) This was decided by Lord Eldon overruling a contrary decision.

14. Only a divided moiety of the estate could be taken under an *elegit*, unless where there were two judgments of the same term either obtained by one creditor or by two creditors, under which practically the entirety could be seized.(e) If resort was had to equity, it was necessary to sue out an *elegit*.(f)

15. But the whole state of the law on this head was altered by an act of the 1st & 2d of the Queen,(g) except as against purchasers, *mortgagees, and creditors, before the 1st of October, 1838,(h) (1) but we shall presently see that it is still neces-

(b) *Causton v. Macklew*, 2 Sim. 242; *Williams v. Craddock*, 4 Sim. 313.

(c) 1 Ves. jr. 431; 3 Atk. 739.

(d) *Forshall v. Cole*, 7 Vin. Ab. 54, pl. 6; 2 Eq. Ca. Ab. 592, pl. 8; App. Purch. No. 18; *Davis v. Strathmore*, 16 Ves. 419; *Willis v. Brown*, 10 Sim. 148; *Cockburne v. Wright*, 6 Ir. E. R. 1; *Beere v. Head*, 8 Ir. E. R. 647; 3 J. & L. 340; *Johnson v. Holdsworth*, 1 Sim. N. S. 186; *In re Phillips*, 4 Ir. Ch. R. 584.

(e) *Att. Gen. v. Andrew*, Hard. 33; *Doe v. Creed*, 5 Bing. 337; see *Hele v. Ld. Bexley*, 17 Beav. 14.

(f) *Neate v. Duke of Marlborough*, 3 My. & Cra. 407. Mr. Heald's notice of *Townsend v. Askew* is a correct representation of what passed. This I stated from my own recollection; see *Foster v. M'Mahon*, 11 Ir. E. R. 296. [See 4 Kent (11th ed.), 428, 429, 431, note, 434-436, & note; 1 Cruise Dig. by Mr. Greenleaf, vol. 2, tit. 14, § 97, in note.]

(g) 1 & 2 Vict. c. 110; the first 22 sections of which are not repealed by 24 & 25 Vict. c. 134. See Sched. G. This should be kept in view.

(h) S. 123; *In re Perrin*, 2 D. & War. 147.

(1) As to Ireland, see 9 Geo. 4, c. 35; 3 & 4 Vict. c. 105; 7 & 8 Vict. c. 90 (for which latter act the writer is responsible, but the registry law of England every five years was then resisted in Ireland); 11 & 12 Vict. c. 120; 13 & 14 Vict. c. 74; *Knox v. Kelly*, 1 Dru. & Wal. 542; *Martin v. D'Arcy*, 1 Ir. E. R. 84; *Borough v. Williamson*, 11 Ir. E. R. 1; *O'Brien v. Scott*, *Id.* 63; *Beere v. Head*, 3 J. & L. 340; *Revell v. Revell*, 4 Ir. C. R. 436. The law in Ireland was altered by the 12 & 13 Vict. c. 95. This act takes away the right to a receiver on a judgment which does not exceed 150*l.*; and a judgment must be a year old, before a receiver can be obtained, and assignments of judgments are rendered inoperative at law in Ireland as they are in England, and voluntary conveyances are made void against judgments entered up be-

sary to keep the old law constantly in view. All the estate instead as formerly a moiety, is, under the new law, to be delivered in execution,⁽ⁱ⁾ and the right * to execution is, except as

(i) For the forms of new writs, see 5 Bing. N. C. 366.

fore such conveyance. By the 13 & 14 Vict. c. 29, a new law is introduced into Ireland. The law of England as to reregistration every five years has been extended to Ireland as well in regard to judgments as to *lis pendens*. The provisions in the 5 & 6 Will. 4, and the 3 & 4 Vict., relating to execution and the appointment of receivers upon judgments, and making these charges upon all the debtor's property, are not to extend to any judgments, &c., entered up, &c., *after* the passing of the act; and no execution (save as after mentioned) is to issue on any such judgment, nor are any lands, &c., to be charged or affected by any such judgment, except as provided by the act. Existing judgments are not to have execution, or a receiver against estates purchased by the debtor *after* the passing of the act, nor are such judgments to operate as a charge thereon with a saving as to any interest in the purchaser before the passing of the act. The new remedy entirely alters the old law. It enables the creditor upon a judgment entered up, &c., *after* the passing of the act, upon his knowledge or belief that the debtor is entitled to some estates, or has a general power over them, and it also enables the creditor upon a judgment entered up, &c., *before* the act, upon his knowledge or belief that the debtor is entitled to or has such a power over some estates which by virtue of the act are exempted from being taken in execution, to make and file an affidavit containing the particulars required by the act, and to register the affidavit in the deed registry office, and the registration is to operate to vest the estates in the creditor for all the debtor's interest, &c., but subject to redemption, and he is to have the same rights and remedies if as a conveyance had been executed to him; and where there is such a registry, voluntary conveyances made after the date of the judgment are made void against the creditor. The act does not prevent execution under a *scire facias* of all such chattel interests as might have been taken in execution if the 3 & 4 Vict. c. 105, had not been passed. Judgment creditors are still to preserve their rights in the administration of assets in equity, but the 3 & 4 Vict. c. 105, s. 22, is not to extend to interests created by way of mortgage or otherwise as securities for money. The 19 & 20 Vict. c. 77, gives a large discretionary power to the court in appointing receivers. No receiver is to be appointed where the sum due does not exceed 150*l.*, nor where the rental of the estate does not exceed 100*l.* per annum, but this is not to prevent the making of any order to extend to a receiver already appointed; and power is given to the court to sell real estate at any time after the institution of the suit. A new court of appeal was provided for Ireland by the 19 & 20 Vict. c. 92; and the 19 & 20 Vict. c. 67, extended the time for the duration of the incumbered estates court; see *Errington v. Rorke*, 5 Ir. C. L. R. 542, as to the indefeasibility of title upon a sale by the court; overruled in *Exch. Ch.* and in *Dom. Proc.* 7 H. L. Cas. 617; 9 Ir. C. L. Rep. 357, *Rorke v. Errington*, where an actual lessee lost his estate because the landlord's estate was sold by the court, and no notice was taken in it of the lease, and this notwithstanding that in a printed rental, under the seal of the court, the lessee's interest was mentioned, and in the advertisements of sale by the commissioners the estate was to be sold subject to the lease. Ultimately, a "landed estate court" was established in Ireland in lieu of the incumbered estate court, under which sales may be made with an indefeasible title, 21 & 22 Vict. c. 72; 24 & 25 Vict. c. 123. The acts for England this session (1862) are in s. 5 of ch. 12, *supra*.

against *such* purchasers, mortgagees, or creditors, now extended to all lands, tenements, rectories, tithes, rents, and hereditaments, including copyhold or customary tenure, which the person against whom execution is sued, or any person in trust for him was seised or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall at the time of entering up the judgment or at any time after, have any disposing power, which he might, without the assent of any other person, exercise for his own benefit in like manner as execution of one moiety might then be delivered. This is s. 11, and it is followed up by s. 13, making the judgment a charge upon all lands, tenements, &c. (including copyholds and customary holds), of which such person is at the time of entering up judgment, or at any time afterwards, seised, possessed, or entitled, for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which the party has a general power, and which is to be binding upon the party, *and against all persons claiming under him after such judgment*, including his issue, and other persons whom he could bar; and relief in equity is to be given to the creditor in like manner as if the debtor had power to charge the hereditaments, and had by writing under his hand agreed to charge the same with the judgment debt and interest; (*k*) but

(*k*) S. 13; *Cathrow v. Eade*, 1 Sm. & Gif. 423; *Ex parte Ness*, 5 C. B. 155; a judgment under this section was held a charge upon a benefice, *Hawkins v. Gathercole*, 1 Sim. N. S. 63; but this was reversed, 6 De G., M. & G. 1; see *Bates v. Brothers*, 2 Sm. & Gif. 509; the law is the same in Ireland, *Digby v. Irvine*, 6 Ir. Eq. R. 149; *Winter v. Homan*, 6 Ir. Ch. R. 479; *Lemberoy v. Helstaine*, 10 Ir. Eq. R. 633; see 6 De G., M. & G. 25, 32. This note in the last edition stated that the law was otherwise in Ireland. This was written *before* the decision in *Hawkins v. Gathercole* was reversed, and when the reference was introduced to the report of the reversal, the words which followed escaped observation. [In the New England States the judgment is not a lien on the estate of

the debtor; and his lands are not bound by it until they are seised upon the execution. But in these States the creditor may gain a lien on the real estate of the debtor by an attachment on mesne process; and this lien continues until a certain period; varying in different States, after the rendition of the judgment, in order to afford sufficient time to levy the execution. If the execution is taken out and seizure of the estate attached is made upon it, within that period, and the levy is afterwards in due time completed, the title to the estate is perfect, either in the judgment creditor, or in the purchaser under the sale upon the execution where a sale has legally been made. This title thus acquired is good against all persons claiming by, through, or under the judgment debtor, from the

no judgment creditor is to proceed in equity until after the expiration of one year from the time of entering up such judgment.⁽¹⁾

time the attachment was made. Provision is generally made in these States that such attachment shall not be valid unless a record is made of it, either in the office of the clerk of the court in some States, or in the registry of deeds in others, within a prescribed period of time after such attachment is made. 4 Kent (11th ed.), 435; 1 Cruise Dig. by Mr. Greenleaf, vol. 2, tit. 14, § 97, in note; Pomroy v. Stevens, 11 Met. 244; see Den v. Carson, 3 Batt. 388; Den v. Keleburn, 3 Batt. 414. Such attachment would not be good against a prior unrecorded deed of which the attaching creditor had notice. Curtis v. Mundy, 3 Met. 405; Priest v. Rice, 1 Pick. 174; Matthews v. De Merritt, 22 Maine, 312; Jewell v. Porter, 31 N. H. 34, 38, 39. The effect of an attachment on mesne process as a lien on real estate in its relation to the bankrupt act of the United States, 1841, was much discussed in Davenport v. Tilton, 10 Met. 320; Kittredge v. Warren, 14 N. H. 509; Kittredge v. Emerson, 7 Law Rep. (Boston) 312; Downer v. Brackett, 5 Law Rep. (Boston) 392; Matter of Rowell, 6 Law Rep. (Boston) 300; Haughton v. Eustis, 5 Law Rep. (Boston) 505; *Ex parte* Foster, 2 Story, 131; Matter of Bellows & Peck, 3 Story, 328. In Davenport v. Tilton, 10 Met. 327, Shaw C. J. said: "By the law of Massachusetts, an attachment of property on mesne process is a specific charge upon the property for the security of the debt sued for, and the property is set apart and placed in the custody of the law for that purpose, subject only to the condition that the attaching creditor shall obtain judgment in the suit, take out execution, and levy it upon the property so held within a limited time." See Matter of Cook, 2 Story, 376. The bankrupt act of 1867, section 14, dissolved all attachments on mesne process of the bankrupt's property, made within four months next preceding

the commencement of the proceedings. Attachments made more than four months before the proceedings are made effectual by a qualified judgment in the action on which the attachment is depending. Bates v. Tappan, 99 Mass. 376; Bowman v. Harding, 56 Maine, 559; Kittredge v. Warren, 14 N. H. 509. It is stated by Mr. Greenleaf that "in New York, New Jersey, Maryland, Virginia, North Carolina, Ohio, Tennessee, Georgia, Mississippi, Florida, and Arkansas, a lien is created either by the rendition, or the docketing of judgments; but it may generally be lost by the omission of further diligence on the part of the creditor. In Illinois there is a lien by judgment, which continues seven years, provided execution is sued out in a year. In Missouri a similar lien continues absolutely for three years; in Pennsylvania, five; and in Indiana, ten. In New York, a docketed judgment, after ten years, ceases to be a lien against *bond fide* purchasers, and against incumbrances created subsequent to the judgment. In Kentucky, the lien is created only by delivery of the execution to the officer. In the States out of New England, attachments issue only in certain specified cases." 1 Cruise Dig. by Mr. Greenleaf, vol. 2, tit. 14, § 97, in note, where the statutes of the several States are referred to. See 4 Kent (11th ed.), 435-437, where in addition to the States above named the judgment is said to be a lien in the States of Delaware, South Carolina, Alabama, and Louisiana; and Chancellor Kent adds: "The lien, after all, amounts only to a security against subsequent purchasers and incumbrancers." The whole subject of attachments

(1) Mackinnon v. Stewart, 1 Sim. & Stu. 91; Robinson v. Hedge, 17 Sim. 183; see 6 De G., M. & G. 11; Yescombe v. Landor, 28 Beav. 80; [2 Dan. Ch. Pr. (4th Am. ed.) 1036, 1037.]

16. This act applies in all its general provisions to judgments in the counties palatine of Lancaster and Durham, and a separate register is established for each county.^(m) And judgments of certain inferior courts of record and rules or orders of such courts for any sum of money, costs, charges, or expenses, may be removed into the superior court and acted upon as a judgment thereof, but this was made subject to a certain restriction,⁽ⁿ⁾ which has been repealed, and they are now placed, when removed, under the same regulations as other judgments.^(o) So any court acting under the 24 & 25 Vict. c. 134, the last bankruptcy act, has power to award * costs, and such costs are recoverable in the same manner as costs awarded by rule of any of the superior courts at Westminster may be recovered, and the like remedies may be had upon an order of such court as upon a rule of any of such superior courts for costs, but no such order is to affect any lands, &c., as to purchasers, mortgagees, or creditors, unless and until it shall be registered, and, if necessary, re-registered pursuant to the provisions of the 23 & 24 Vict. c. 38, any notice of any such order to any such purchaser, mortgagee, or creditor in any wise notwithstanding.^(p)

17. And decrees and orders of courts of equity,⁽¹⁾ and all rules of courts of law, and all orders of the lord chancellor or of

and the effect thereof, and the effects of judgments as liens or incumbrances upon real estate, will be found provided for by the positive laws of each State, which, in consequence of the constant changes taking place in them, it would be hardly safe to state here in detail as the permanent law of the respective States. Under the laws of Virginia in relation to the lands of which the debtor has an actual seisin, although there is no statute in that State which makes a judgment a lien on the lands of the debtor, yet during the existence of the right of the plaintiff to take out an *elegit*, the lien of the judgment

is universally acknowledged. *Burton v. Smith*, 13 Peters (U. S.), 464; see *Matter of Cook*, 2 Story, 376.]

(m) 1 & 2 Vict. c. 110, s. 21.

(n) *Ib.* s. 22.

(o) 18 Vict. c. 15, s. 7, and see s. 1.

(p) Sect. 213. There is a mistake in this section in referring incorrectly to the previous acts; see note to Jemmett's Bankruptcy Acts and Orders, p. 92. The writer endeavored to correct the oversight by a clause in a bill which passed the Lords this session, 1862, but was dropped in the Commons.

(1) Decree for specific performance, and order to purchaser to pay purchase money, interest, and costs when ascertained by the master, a judgment debt in the vendor. *Duke of Beaufort v. Phillips*, 1 De G. & Sm. 321; but a decree in favor of a creditor gives no right against purchasers, mortgagees, and creditors, until registered in the C. P.; *Lee v. Green*, 25 L. J. N. S. 269, 2 Jur. N. S. 170, 6 De G., M. & G. 155.

the court of appeal sitting in bankruptcy, and all orders of the lord chancellor in matters of lunacy, whereby any sum of money or any costs shall be payable to any person, are to have the effect of judgments.(q)

18. It is now immaterial whether the seller has an equitable or a legal estate, and the period of inquiry as to an equitable ownership is the time of entering up of the judgment, or any time afterwards, and therefore the transfer of the legal estate after the judgment, and before execution sued, is no longer material: nor is it important whether the seller has an estate with or without a general power, for in either case the judgment is equally binding, or whether the seller has *only* a general power, for that is for this purpose treated as an estate, and the judgment creditor has no longer a general lien but an actual charge on the estate, to which a court of equity is bound to give effect.

19. Leasehold estates, whether legal or equitable, seem to be subject to the legal (r) as well as the equitable remedy.

20. An annuity given by will through the medium of trustees charged on real estate, is of course liable to the judgments of the annuitant.(s)

* 21. The interest of a mortgagee may also be made liable to a judgment under this provision; (t) and where an annuity was secured by a deed of covenant and by an assignment of a leasehold to the annuitant to secure it, with a trust or power to sell if it should be in arrear, it was held that a judgment creditor of the annuitant was entitled to have the annuity sold, and the proceeds applied in payment of his debt, and of course the purchaser would have all the securities which the annuitant had.(u) By a later act,(x) in consequence of the great delay and expense occasioned upon purchases and mortgages by judgments continuing

(q) S. 18, 19; 12 & 13 Vict. c. 106, s. 123, 248; which sections are not repealed by 24 & 25 Vict. c. 134; see Sched. G. and s. 77, &c. of the act; 12 & 13 Vict. c. 107, Ireland; Jones v. Williams, 11 Ad. & El. 175.

(r) 1 Dru. & War. 182; Gore v. Bowser, 3 Sm. & Gif. 1; Westbrook v. Blythe, 3 E. & B. 737; *inf.* as to notice; see 19 & 20 Vict. c. 97, s. 1, as to execution against "goods."

(s) Younghusband v. Gisborne, 1 De G. & Sm. 209.

(t) Clare v. Wood, 4 Hare, 81. [A mortgagee's interest in land is not subject to attachment or execution in Massachusetts. Marsh v. Austin, 1 Allen, 235; Eaton v. Whiting, 3 Pick. 240.]

(u) Harris v. Davison, 15 Sim. 128; Avison v. Holmes, 1 J. & H. 530.

(x) 18 Vict. c. 15, s. 11; 13 & 14 Vict. c. 29, s. 12, *Ir.*

to bind lands, although the mortgagees had been *bonâ fide* paid off, and the lands had been actually conveyed to purchasers or to other mortgagees, (y) it is provided that a purchaser or mortgagee shall not be liable to any judgment, order, &c., against any mortgagees who shall have been paid off prior to or at the time of the execution of such conveyance. It seems to admit of no doubt, that although a mortgagee may not be fully paid all that is due to him, as for example where he sells under a power of sale in his mortgage, and the produce is not sufficient to fully answer the mortgage money, yet he will be deemed to have been paid off under this provision. It has been decided that since the act, the judgment creditors of a mortgagee who is paid off either prior to or at the time of the execution of the conveyance are not necessary parties to the conveyance, for they are prevented by the act from taking the mortgaged land in execution. (z)

22. Of course a judgment against one of several joint tenants will bind the share of the debtor as against the survivors.

23. In the case of powers, if the power be in the debtor himself, the judgment will be as binding as if the power had been executed; but if the power were merely testamentary, it would seem that the judgment would not bind. (a) Of course, whatever interest the debtor has, in default of the execution of a power, vested wholly or partially in himself, would be bound. Therefore, although the power of the debtor be required to be executed with the assent of some other person, or the power be vested in him and another jointly, yet any interest of his in default of appointment would be bound and he could not by subsequently concurring in an execution of the power, defeat the judgment creditor.

24. Where a purchaser accepted the title and was let into possession, and paid part of the money, but became insolvent; upon a sale by the court, upon the application of the seller for raising the money unpaid, the purchaser required the concurrence of the registered *judgment creditors of the first purchaser prior to the decree for sale, who were not parties to the suit, the court, without deciding the point, discharged the purchaser. But Lord J. Turner entertained no doubt upon the question. The first pur-

(y) *Clare v. Wood*, 4 Hare, 81; *Harris v. Davison*, 15 Sim. 128.

(z) *Greaves v. Wilson*, 25 Beav. 434.

(a) *In re Phillips*, 4 Ir. Ch. R. 584.

chaser had accepted the title, and so before the commencement of the suit had become the equitable owner of the land, subject only to the plaintiff, the seller's, lien for the unpaid portion of the purchase money. He did not say how the case would have stood if the title of the plaintiff had never been accepted by the purchaser.(b) Even in that case, it would seem that the judgments were charges, for the purchaser was equitable owner of the land subject to the seller's lien, and subject to that lien the judgments operated. The sale by the court was not a rescinding of the contract, but in truth a performance of it as far as it could be enforced after the purchaser's insolvency.

25. A judgment against a tenant in tail will bind a purchaser from the issue in tail, or any remainder-man whom the tenant in tail might have barred. But this is confined to the relief under s. 13, for there is a marked distinction in the act between what may be delivered on an *elegit* and what is made liable to a charge. The general words as to the legal right, would not bind issue in tail or remainder-man, and the words, "over which the party shall have any disposing power, &c.," mean only a power of appointment, and not a power of disposition under the substitute for recovery act. This is proved, not merely by the words themselves, but by the enactment (s. 13), which creates the charge where the same words are used in the same confined sense, followed by a clause expressly making the charge binding against the issue of the body of the party, and all other persons whom he might without the assent of any other person cut off from any remainder, reversion, or other interest in or out of any of the hereditaments. As Shadwell V. C. observed, with reference to another point, the words of the thirteenth section are not the same as those of the twelfth [eleventh]; the language of the former is much more copious than the language of the latter.(c) In a suit by a judgment creditor against his debtor who had become tenant in tail in possession, the latter was ordered to execute a disentailing deed.(d)

26. The act of parliament is perfectly clear and free from all ambiguity and doubt. That which formerly by force of the statute of Westminster was a general charge upon lands, now

(b) *Gov'rs of G. C. Hosp. v. West'r Imp. Comm'rs*, 1 De G. & J. 531.

(c) 15 Sim. 132.

(d) *Lewis v. Duncombe*, 20 Beav. 398.

by force of the express directions of this act becomes a specific lien: words cannot be more express. If a man has power to charge certain lands, and agrees to charge them, in equity he has actually charged them; and a court of equity will execute the charge. When the act of parliament says that every judgment creditor shall have the same * remedies in a court of equity as he would have been entitled to in case the person against whom the judgment has been entered had agreed to charge the lands with the amount of that judgment debt, whether that charge be legal or equitable, the judgment becomes in the view of a court of equity an equitable estate. We are no longer dealing with a general lien, but with a specific incumbrance.(e)

27. The enactment that the judgment shall operate as a charge upon the estate, means a charge upon the beneficial interest of the debtor. If he has a legal estate, subject to an equity, it will be a charge upon the estate, subject to the same equity; in the case of an equitable estate, it will be a charge upon the equitable interest.(f) Therefore an equitable mortgagee must be preferred to a subsequent judgment creditor, who will be prevented from executing his judgment as against the mortgage, although he had not notice of the mortgage when he obtained his judgment.(g) This was the rule in equity before the late statute, and it is not altered by the statute. The rule of equity is consequently still the same in regard to the rights of a purchaser under a contract, as against a judgment entered up subsequently to the contract, but before the conveyance, and we need therefore only refer to the former statement under that head. In a case in which this doctrine was elaborately considered, the learned judge, in one passage, is reported to have said that it was laid down that, after a contract for the sale of the land, the debtor has no longer any interest in it, and there is, therefore, nothing for the judgment creditor to take. But this

(e) *Rolleston v. Morton*, 1 Dru. & War. 195, per L. C.; *Bond v. Bell*, 4 Drew. 157; see *Benham v. Keane*, 1 J. & H. 685.

(f) Per L. C. 1 Phil. 735; 18 Vict. c. 15, s. 11; *M'Auley v. Clarendon*, 8 Ir. Ch. R. 121, 568.

(g) *Langton v. Horton*, 1 Hare, 560; *Whitworth v. Gaugain*, Cra. & Ph. 325; 3 Hare, 416; 1 Phil. 728; *Abbott v. Stratton*, 3 J. & L. 603; *Dunster v. Ld. Gleggall*, 13 Ir. C. R. 47; *Kinderley v. Jervis* 22 Beav. 1; *Benham v. Keane*, 1 J. & H. 685.

carries the rule too far, and the principle is correctly laid down in the other portions of the judgment.^(h)

28. But by the new law to enable a judgment creditor to render the estate liable to his debt when it is vested in a purchaser, it is necessary the judgment should be registered.⁽ⁱ⁾ And no judgment of which a minute is left as directed, has a retrospective operation as against purchasers, mortgagees, and creditors.^(k) One register is established for *all* judgments (except in the palatine counties which have separate registers, subject to the same rules), and the charge for a search of the whole is limited to one shilling. And these searches in the several books may be made by the parties themselves (which, of course, means the persons searching), under proper regulations in the office; and one shilling only is payable on one search, * although more names than one shall be searched for, where such names relate to the same purchase, mortgage, or other transaction.^(l) And it is provided,^(m) that no judgment shall affect any purchaser unless a minute containing the name and the usual or last place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, with other particulars, shall be left with the senior master of the court of common pleas, who shall enter the same in a book in alphabetical order by the name of such person, and the year, and the day of the month when every such memorandum or minute is so left with him.⁽ⁿ⁾ The old acts are not repealed, but the 2 Vict. c. 11, directed the dockets established by the act of William & Mary to be finally closed immediately,⁽¹⁾ and that no judgment, de-

(h) *Benham v. Keane*, 1 J. & H. 685,
aff'd 31 L. J. N. S. 129.

(i) 1 & 2 Vict. c. 110.

(k) *Hargrave v. Hargrave*, 23 Beav.

484; [4 Kent (11th ed.), 437.]

(l) 18 Vict. c. 15, s. 13.

(m) 1 & 2 Vict. c. 110, s. 19.

(n) 2 Vict. c. 11, s. 3.

(1) For what is a compliance with the directions of the old act, see *Brandling v. Plummer*, 29 L. T. 31. This closing of the old docket has been held to be a revivor of the old law, so that an executor became liable by payment of a simple contract debt before a judgment debt, although he had no notice of the judgment. *Fuller v. Redman*, 26 Beav. 600. The 23 & 24 Vict. c. 38, s. 3 & 4, set this point right; but, although the writer framed and introduced those clauses into his bill, he did not concur in the objection, because he thought that the subsequent acts having made judgments not registered under their provisions void against *creditors* as well as purchasers and

cree, &c., should *by virtue of the 1 & 2 Vict. c. 110*, affect any purchaser unless the name was registered under that act, so that a judgment entered up before the act, binding upon purchasers under the old act, would not have the extended operation given by the later act unless it were registered in the common pleas under it. And it was provided,^(o) that no judgment already docketed under the act of William & Mary should, after the 1st August, 1841, affect any purchasers, mortgagees, or creditors, unless and until such memorandum as was prescribed by the 1 & 2 Vict. c. 110, is left with the senior master of the common pleas. And judgments in the palatine courts obtained before the passing of the 1 & 2 Vict. c. 110, and not registered under it, are required in order to bind purchasers to be registered in the proper courts on or before the 1st November, 1855;^(p) and judgments of inferior courts removed to the superior court must, to bind purchasers, also be registered.^(q) Finally, orders of the court of bankruptcy amounting to judgments under the bankrupt law consolidation act, 1849, and the bankruptcy act, 1861, are required to be registered in order to bind purchasers.^(r) The result therefore is, that now all judgments (those in the palatine counties being in their own registries) * are brought into one register, which, with full particulars as to identity, may be searched for one shilling. This is a great relief to purchasers. But it may not be safe to dispense with a search in the general registry upon the purchase of an estate in either of the counties palatine.^(s) The phraseology of the act of 1 & 2 Vict. as to the terms upon which judgments shall bind purchasers should be kept in view, for although it provides that no judgment, &c., by virtue of the act shall bind a purchaser unless a minute of the particulars required shall be left with the senior master of the common pleas, yet it does not go on to say, nor unless he shall enter the particulars in a book, but directs him to make the entry; and the like provision is made for the palatine counties. A purchaser, therefore, might be bound if the creditor had per-

(o) 2 Vict. c. 11, s. 2.

(r) *Ib.* s. 10.

(p) 18 Vict. c. 15, s. 1, 3.

(s) *Prid. Judg.* 119.

(q) 18 Vict. c. 15, s. 7.

mortgagees, the protection to executors and administrators in the administration of assets, who represented and were trustees for the creditors, was continued.

formed his part, although by the negligence of the officer the judgment had not been entered in the book, and his only remedy would be against the officer for his neglect. This shows the propriety of the protection given to purchasers without notice, which will shortly be stated. Of course, it was held that a docketed judgment which the creditor had neglected to register under the new acts, formed no objection to a vendor's title.^(t)

29. The writer made several attempts which were supported by the House of Lords, but defeated in the House of Commons, to relieve purchasers and mortgagees generally, from judgments unless writs of execution had been issued and executed thereupon. Parliament was at length induced, as a prospective measure,⁽¹⁾ to pass a modified bill. The 23 & 24 Vict. c. 38, after reciting that it was desirable to place freehold, copyhold, and customary estates on the same footing with leasehold estates in respect of judgments, statutes, and recognizances, as against purchasers and mortgagees, and also to enable purchasers and mortgagees to ascertain when execution has issued, and to protect them against delay in the execution of the writ, enacted that no judgment, statute, or recognizance to be entered up after the passing of the act, shall affect any lands of any tenure as to a *bonâ fide* purchaser for a valuable consideration or a mortgagee (whether such purchaser or mortgagee have notice or not), unless a writ or other due process of execution of such judgment, &c., shall have been issued and registered as thereby required before the execution of the conveyance or mortgage to him; and the payment of the purchase or mortgage money by him; and it is provided further that to bind a purchaser or mortgagee the execution or other *process issued and registered as aforesaid, must be executed or put in force within three calendar months from the time when it was registered.^(u) The act then provides for the mode of registering such writs of execution and other due process.^(x) These provisions are in the right direction, and after some time will be a great protection to purchasers and greatly facilitate the transfer of land. The register has been so arranged

(t) *Bedford v. Forbes*, 1 C. & K. 33.

(x) Sect. 2.

(u) Sect. 1.

(1) The act received the royal assent the 26th July, 1860. The retrospective operation was negatived in the Commons.

that a purchaser can by casting his eye on the last column not only see whether the judgment has been reregistered, but also whether execution has issued. It should be borne in mind that judgments entered up before the 23d July, 1860, will still bind although no writ of execution thereon has been issued.(1) Facilities have also been given for entering up satisfaction on the register, of registered judgments, pending suit, *lis pendens*, decree, order, rule, annuity, or rentcharge, or writ of execution.(y)

30. In order to still further provide purchasers with facilities to ascertain what judgments affected the properties they proposed to purchase, it was provided,(z) that all judgments, decrees, or orders which had been registered under the 1 & 2 Vict. c. 110, or which thereafter should be so registered, should after five years from the date of the entry thereof, be null and void against lands, &c., as to purchasers, mortgagees, or creditors, unless a like memorandum or minute as was required in the first instance were again left with the senior master of the common pleas, within five years before the execution of the conveyance, settlement, mortgage, or other instrument vesting or transferring the legal or equitable interest in or to any such purchaser or mortgagee for valuable consideration, or as to * creditors within five years before the right of such creditors accrued, and so *toties*

(y) 23 & 24 Vict. c. 115, s. 2.

(z) 2 Vict. c. 11, s. 4.

(1) In the bill before referred to as having been lost in the Commons, a clause was introduced to amend the mode of registering writs of execution by entering the same, not in the name of the creditor, but in the name of the person against whom the writ issued.

I find upon inquiry from the office that the act of 1860 has operated favorably in diminishing the vast number of registered judgments. In 1859, 2,625 judgments were registered. In 1860, in the latter part of which year the act came into operation, 489 judgments less were registered; and in 1861, 1,821 only were registered, being 804 less than in 1859. Judgments, it seems, are now taken only as primary securities: and these and adverse judgments alone are registered; and it is anticipated in the office that the number of these will diminish, for unless the creditor knows that there is real property he frequently does not now register. The increase of expense and the registry after three months becoming an uncertain security, are the causes of the less frequent resort to the registry.

In this session, 1862, a bill was introduced into the House of Commons to render all future judgments void against purchasers and mortgagees, although with notice, and existing judgments were to cease to be binding against them after three years; but in consequence of the opposition of the government, which I think was fully justified, the bill was withdrawn.

quoties at the expiration of every succeeding five years. Reregistration is equally necessary as to judgments removed from inferior courts,^(a) and also as to judgments in the counties palatine.^(b) This provision, from the very terms of it, was only to apply to purchasers and creditors who became such subsequently to the original registration. The object was to prevent the necessity of a search for more than five years, and this is clearly accomplished. Where a judgment was properly registered at the time of the purchase there could be no object in requiring a reregistry against such a purchaser, for he was already bound by the judgment, and no new search was necessary on his part. Where it was reregistered within five years before the conveyance to the purchaser, it mattered not when the reregistry took place. These points, which are of great importance, have however been the subject of legislative enactment and judicial opinion. In a case before Vice Chancellor Stuart,^(c) where upon an objection to title, the purchaser contended that the reregistration was valid if made within five years before the execution of the conveyance to the purchaser, whilst the vendor insisted that the reregistration to be binding must be within five years after the first registration; the vice chancellor was clearly of opinion that the seller's view was the right one, and decided accordingly; but upon an appeal it became unnecessary to decide the point. Although the view taken by the vice chancellor was considered to be opposed to the language and the scope of the act, yet the writer thought it better to remove the judicial doubt by legislative interference, and accordingly by the 18 Vict. c. 15, s. 6,⁽¹⁾ it was enacted that it should be deemed sufficient to bind purchasers, mortgagees, and creditors, if such a minute as was required in the first instance were again left with the senior master of the common pleas within five years before the execution of the conveyance, &c., to the purchaser or mortgagee for valuable consideration, or as to creditors within five years before the

(a) 18 Vict. c. 15, s. 7.

(c) *Freer v. Hesse*, 17 Jur. 177, 703; 1

(b) 18 Vict. c. 15, s. 3; and so must or- Eq. R. 336; 4 De G., M. & G. 495.
 ders for costs in bankruptcy, 24 & 25 Vict.
 c. 134, s. 213, *sup.* pl. 20, n.

(1) This section was directed solely to *Freer v. Hesse*, and had not in view, as has been erroneously supposed, the point raised and decided in *Beavan v. Ld. Oxford*.

right of such creditors accrued, as directed by the act of the 2d Viot., *although more than five years shall have expired by effluxion of time since the last previous registration before such last mentioned minute was left*, and so *toties quoties* upon every reregistry. It was only by the explanation in italics that the framer of the act could add to the force of the original enactment.

31. The case of *Shaw v. Neal* (*d*) followed that of *Freer v. Hesse*,* and was decided shortly before the act of the 18th of the Queen received the royal assent, and the decision at the rolls was not then known by the person who introduced the bill. The master of the rolls decided that where there were — 1. a registered judgment; 2. a mortgage; and 3. a reregistry of the judgment after the five years had expired, the judgment was postponed to the mortgage, for although originally it was a valid first charge, yet it ceased to be a charge altogether, and the reregistration operated only to create a new charge. A case then came before the court of appeal from the chief clerk's certificate, (*f*) in which the same point called for a decision. There were — 1. a registered judgment; 2. a later registered judgment of another creditor, and the latter reregistered his judgment within the five years, whilst the former neglected to register his until after the five years had expired. The decision of the master of the rolls of course entitled the second judgment creditor to claim the priority; but Lord Chancellor Cranworth and Lord Justice Turner decided (Lord Justice K. Bruce expressing some doubt), that the first judgment creditor had not lost his priority, for the object of the statute was to obviate the necessity of a search for an indefinite number of years, and therefore the omission to reregister judgments only had reference to purchasers who came in after the expiration of the five years, and who were only bound to search during the preceding five years. The reregistration as between these two creditors had no effect. This decision, the court was aware, was at variance with that at the rolls in *Shaw v. Neale*, but it was in accordance with a judgment in Ireland, to which reference was made. The writer may be allowed to add, that he considers this to be the true construction of the act. As between parties therefore, once bound by duly

(*d*) 20 Beav. 157.

& G. 492; 1 Jur. N. S. 1121; 2 Jur. N. S.

(*f*) *Beavan v. Ld. Oxford*, 6 De G., M. 121.

registered incumbrances, their rights cannot be affected by the neglect of or by reregistration; but to bind future purchasers every incumbrancer must reregister within the time limited by the act. It is no objection to this construction, that by a neglect to reregister for some time, priorities of incumbrancers may become somewhat complicated. Since the last edition of this work, *Shaw v. Neale* has been reversed in the Lords, and the law on this point is settled.(g)

32. Registration never was held to be notice to a purchaser, but he was, as we have seen, bound by judgments not registered of which he had notice. But now notice of unregistered judgments * does not affect a purchaser, nor does notice of a registered judgment affect a purchaser where the judgment has not been reregistered in due time. A judgment creditor must now rely on his own diligence, and cannot supply the want of it by fixing a purchaser with notice.

33. Although the law as to notice is thus settled, and the whole doctrine in regard to judgments binding purchasers is perfectly simple, yet it may be necessary to trace for the practitioner the steps by which this was accomplished as to notice, for it was only by slow degrees that the law could be placed on its present footing, and the provisions of the acts have frequently been misunderstood. The 1 & 2 Vict. c. 110, as it was originally framed, contained no saving for purchasers for value without notice, but a proviso to that effect was introduced by the writer in the progress of the bill through parliament.(h) But as this left a *bonâ fide* purchaser without notice in many cases, still liable more extensively to judgment creditors than he was before the statute, which could hardly have been the intention of the legislature, the old rule was restored by the 2 Vict. c. 11, for which the writer is responsible. It enacted,(i) that as against purchasers and mortgagees without notice of any judgment, decrees, or orders, &c., none of them should bind or affect any

(g) *Shaw v. Neale*, 6 H. L. Cas. 581. It may be observed that one of the law lords who heard the argument was not present when the House gave judgment, which was simply owing to his having considered the case as disposed of when the argument closed; he had declared his opin-

ion in concurrence with the other law lords in favor of a reversal; *Benham v. Keane*, 1 J. & H. 685; affirmed 31 L. J. N. S. 129.

(h) Sect. 13.

(i) Sect. 5.

lands, tenements, or hereditaments, further or otherwise, or more extensively in any respect, although duly registered, than a judgment of one of the superior courts would have bound such purchaser or mortgagee before the act of the 1 & 2 of the Queen, where it had been duly docketed according to the law then in force. This therefore left a purchaser for value without notice in the same favorable position in which he stood before the last mentioned act passed.*(k)* A year later another act was passed,*(l)* the framer of which seems not to have been aware of the act which has just been quoted. By the act to which I refer, after reciting that doubts had been entertained whether a purchaser, mortgagee, or creditor, having notice of any such judgment, decree, order, or rule, as aforesaid, would not in equity be affected thereby, notwithstanding such a memorandum or minute of the same as in the act of the 1 & 2 Vict. c. 110 is mentioned, might not have been left with the senior master of the court of common pleas, it was therefore *declared* and enacted that no such judgment, decree, order, or rule, as aforesaid, should *by virtue of the said act of the 1 & 2 Vict.* affect any lands, tenements, or hereditaments at law or in equity, as to purchasers, mortgagees, or creditors, unless and until such a memorandum or minute as in the said act in that behalf mentioned should have been left with the senior master of the * common pleas at Westminster ; *any notice of any such judgment, decree, order, or rule to any such purchaser, mortgagee, or creditor, in any wise notwithstanding.* This last act, therefore, makes notice of a judgment not binding upon a purchaser, unless the judgment be duly left for registry ; but this was only as far as related to the force of the judgment by virtue of the act of the 1 & 2 of the Queen, yet in the last edition of this work the writer endeavored to show that notice of an unregistered judgment would not bind a purchaser for value to any extent, and that reregistry could not be supplied by notice.*(m)* And now all doubt on these points is at an end, for, as we have seen, the rights of purchasers without notice were saved by the

(k) 1 Hare, 561 ; 1 Phil. 730.

(l) 3 & 4 Vict. c. 82, s. 2.

(m) Beere v. Head, 3 J. & L. 340, the point so decided in Ireland under 9 Geo. 4, c. 35 ; 3 & 4 Vict. c. 105, Ireland, has

words to effect the object, as to notice, of the 3 & 4 Vict. c. 82, England ; *In re Huthwaite's Estate*, 2 Ir. C. R. 54 ; as to 9 Geo. 4, see *In re Judge*, 3 Ir. C. R. 152.

statutes of the 1 & 2 and the 2d of the Queen, and by the 3 & 4 of the Queen, notice was made inoperative against a purchaser unless the judgment creditor had left a proper memorandum for registry, as far as he sought the benefit of the act of the 1 & 2 of the Queen; and by a still later act, for which the writer is responsible, it is enacted generally, that no judgment, &c., which might be registered under the act of the 1 & 2 Vict. shall affect any lands, at law, or in equity, as to purchasers, mortgagees, or creditors, unless and until such a minute as in that act mentioned shall have been left with the proper officer of the proper court, *any notice of any such judgment, &c., to any purchaser, mortgagee, or creditor in any wise notwithstanding.*(n) And the provision contained in the act of the 3 & 4 of the Queen as to notice is declared and enacted to extend, and shall be deemed to extend as well to the act of the 1 & 2 of the Queen as to the provision in the 2d of the Queen, c. 11, as explained by the present act, *so that notice of any judgment, &c., not duly registered shall not avail against purchasers, mortgagees, or creditors, as to lands, tenements, or hereditaments.*(o) This seems to accomplish all that was required.

34. The result of legislation and of judicial decision is, that a purchaser may safely rely on the register for the last five years, and cannot be affected by notice. But it is still necessary to consider the operation of *registered* judgments in certain cases where the purchaser had not notice of them. We have already seen that judgments although registered, do not bind purchasers further than they would have done if duly docketed before the act of the 1st and 2d of the Queen. Therefore a judgment entered up after the purchase money paid, but before the conveyance, would still not bind the purchaser, although registered, because, although the judgment creditor has no longer a mere general security, but has a specific charge on the land, * and the purchaser has no equity superior to a *bonâ fide* creditor, with an actual charge, yet the provisions of the new laws in favor of purchasers without notice apply to this case, and leave the old law untouched. This, however, as put, is hardly a case to which want of notice applies, because the money is paid before the judgment is entered up, but in the various instances under con-

(n) 18 Vict. c. 15, s. 4.

(o) Sect. 5.

tract before put, the old law, upon the true construction of the statutes, still operates.(p) In *Benham v. Keane* (q) it was observed that the statute does not specify from whom the purchase is to be made. The language used, though not very accurate and precise, strongly indicates the intention of the act. It makes the judgment not duly kept on the register void against lands, &c., as to purchasers, mortgagees, and creditors. This must mean as against all persons deriving title from the judgment debtor, who but for this enactment would be affected by the judgment. Of course these words do not apply to lords taking by escheat, or persons deriving title otherwise than through the judgment debtor; but the words are large enough to extend the benefit of the enactment to all *bonâ fide* purchasers and mortgagees deriving title from the debtor, and to relieve them from any judgment which they do not find entered upon the register during the previous five years. The purchaser, it is true, may have to look for the names of various persons who, for a considerable time past, have been interested in the property, but in each case he may limit his search to the period of five years last past.(q)

35. So a purchaser having already the legal estate, as a mortgagee, will still not be bound by judgments entered up subsequently to the mortgage of which he has not notice, although registered, for although the equity of redemption is now charged with the judgment, yet the purchaser having equal equity, and having the legal estate, will be able to defend himself against the judgment creditor.(r)

36. Mere trust estates now stand upon a different footing: they may be extended under section 11 of the 1 & 2 Vict., which extends the remedy to lands, &c., of which the person against whom execution is sued, or any person in trust for him, is seised or possessed *at the time of entering up the judgment, or at any time afterwards*.(r¹) And, therefore, if the legal fee were vested in A. in trust for B., and they were to convey to a purchaser, he

(p) *Supra*, pl. 2, 4; *Benham v. Keane*, 1 J. & H. 685; affirmed 31 L. J. N. S. 129. (r) As to an equitable mortgagee's right to tack, see *Cooke v. Wilton*, 29 Beav. 100.

(q) *Benham v. Keane*, 1 J. & H. 685; (r¹) [See *ante*, 519, note (l').] *per Cur. Wood V. C.*

would be bound by any judgment registered against B., the seller, before the conveyance, just the same as if the latter had himself had the legal estate. But if he were a purchaser without notice, he would, under the 2 Vict. c. 11, s. 5, hold free from the judgment, execution upon which could not * be sued against him: the old law in this case as to *such* a purchaser is still in force.

37. In the case already stated of a conveyance to trustees to sell, with power to give receipts, although the grantor has an interest in the surplus moneys to arise by sale, the law is not altered as regards a purchaser, and although the judgment creditor could no doubt enforce his right against the surplus he could not affect a purchaser.

38. The right of a purchaser without notice of a judgment to protect himself against it by a *prior* legal estate is not now, as we have seen, affected by the 1 & 2 Vict.; but the protection afforded by an attendant term will soon cease.(s)

39. The execution of a power by the debtor by which an estate vested in him is divested, will no longer defeat the judgment; but here again, a purchaser without notice will be entitled to the benefit of the fifth section of the 2 Vict. c. 11.

40. And leasehold estates are now bound in like manner as freeholds; an equity of redemption just the same as an equity of redemption in a fee simple estate.(t) But a judgment, although duly registered in the common pleas, will not as against a purchaser of a leasehold estate for value without notice before execution issued bind the leasehold, for although a charge upon it under 1 & 2 Vict. c. 110, yet before that act a docketed judgment would not have bound a leasehold estate until an *elegit* was awarded, and now the 2 Vict. c. 11, gives to such a judgment against such a purchaser only the same effect it had before, and where the purchaser has obtained the legal estate before the *elegit* that avoids any question upon the charge under the 1 & 2 Vict. c. 110. This was decided at law.(u) The same rule would no doubt apply to an equitable estate in a lease-

(s) 8 & 9 Vict. c. 112, *sup.* ch. 12.

(u) *Westbrook v. Blythe*, 3 E. & B. 737.

(t) See *Gore v. Bowser*, 3 Sm. & Gif. 1; *Langhorne v. Harland*, 2 Jur. N. S. 873.

hold.(1) A judgment of a county court will be aided in equity where the debtor has only an equitable estate in a leasehold.(x) But the 2 & 3 Vict. c. 11, as far as it applies to *creditors*, only makes a judgment void against the lands of the debtor in respect of any creditor who can assert a right against those lands where the judgment has not been registered within five years before such right accrued. Therefore in *Simpson v. Morley*,(y) where a man obtained two judgments, and registered them, and after five years the debtor died possessed of a leasehold estate, and after his death the judgments * were reregistered, which was followed by a common creditor's suit, with the usual decree, and then the judgment creditor filed his bill to realize his judgment debt by sale of the leasehold property: he obtained a decree, thereby establishing his right against the simple contract creditors, whose only right was to see that the executor got in the property and paid the debts.(2)

41. And copyholds and estates of customary tenure are also, as we have seen, made liable to judgments; but in none of these cases is the former liability of a purchaser without notice increased.

42. We have at length arrived at one object of this investigation,—In what cases should search be made for judgments? The answer is, that in *no case* should a purchaser now dispense with a search for judgments up to the time of completing his purchase. It is no longer safe to rely upon an outstanding legal estate; the execution of a power will not defeat the judgment, and it binds equitable as well as legal estates; powers amounting to ownership as well as actual estates. Even the most solvent person may have an order of some court against him for

(x) *Bennett v. Powell*, 3 Drew. 326.

(y) 2 K. & J. 71.

(1) In *Watts v. Porter*, 3 E. & B. 743, it was held by three judges against one, that a judgment creditor without notice of an equitable mortgage, obtaining an order making his debt a charge on the fund, and giving notice to the trustees of the fund, was entitled to prevail over the equitable mortgagee who had not given notice to the trustees. The opinion of the single judge seems to be the correct one; see now *Beavan v. Ld. Oxford*, 2 Jur. N. S. 121; 6 De G., M. & G. 524; and *Kinderley v. Jarvis*, 22 Beav. 1, where the decision was not followed; and also *Scott v. Ld. Hastings*, 4 K. & J. 633.

(2) It was doubted whether, upon a common decree for an account, any right would attach upon the leaseholds, unless the decree directed a sale of them.

payment of costs, which the person obtaining it may choose to make binding upon purchasers; and although the provision in the 2 Vict. c. 11, s. 5, is a great safeguard to purchasers, yet it would not be wise to rely upon it, as notice may be proved by slight circumstances. And it should be borne in mind, that although a purchaser buy without notice, yet unless he has a defence under the acts, judgments duly registered would of course bind him. Of course the search for the five years should be against all persons whose judgments would bind the estate; and not merely against the seller, for although a man may have sold his estate more than five years ago, yet his registered judgment debts may, by reregistry, be kept alive.

43. And the register of judgments should be searched, although the estate lie in a registry county; but the recent acts for registering judgments have not repealed the acts of Anne for registering them in the deed registry offices.(z)(1)

44. The recent act requiring writs of execution to be issued and registered after the 26th July, 1860, should be borne in mind; (a) *and it should be kept in view, that a judgment against a tenant in tail will in equity bind his issue, and the remainder-men, where he could bar them without the consent of a protector, so that in purchasing from the issue or a remainderman, it will be necessary to search for judgments against the tenant in tail, as well as against the seller.

45. But, as we have seen, the rights given by the act do not extend against purchasers before the 1st October, 1838.(2)

46. The search for judgments should be postponed to the last moment, lest any should be entered up between the search and the completion of the conveyance. But the vendor or his at-

(z) *Johnson v. Houldsworth*, 1 Sim. N. S. 1, 106; *Robinson v. Woodward*, 4 De G. & Sm. 562; *Hughes v. Lumley*, 4 E. & B. 274; *Westbrook v. Blythe*, 3 E. & B. 737; 2 K. & J. 73. *Knights Bruce V. C.* seems to have differed from *Johnson v. Houldsworth*. The point is now settled. *Benham v. Keane*, 1 J. & H. 685; *infra*, ch. 22, s. 4, pl. 5. (a) *Supra*, pl. 33.

(1) In the bill before referred to for amendment of the law of property, which was dropped in the Commons, the registry in the common pleas was to operate in the register counties, but was not to extend to the palatine courts of Lancaster and Durham.

(2) See *Gillichan v. M'Gusty*, 5 Ir. Ch. R. 348, upon the Irish act, that the provision applies only to purchasers for valuable consideration. It is surprising that this should have been doubted.

torney should be asked at once in writing whether there are any incumbrances which do not appear upon the abstract. If he answer in the negative, and upon search at the latest period any such should exist, and the purchase cannot on that account be completed, the purchaser would be able to recover all his expenses from the vendor, including even the expense of the conveyance.(b) No serious expense should be incurred until the abstract is examined with the deeds. But a purchaser may always with propriety at once search for judgments, and if a title cannot be made, he may recover from the vendor the expense attending the search.(c) If an early search be made, and there is any reason to suspect the seller, the register should again be inspected immediately before the execution of the conveyance.(c¹)

47. A judgment creditor may forfeit his charge under the act by taking the debtor in execution upon the judgment.(d)

48. A statute of James the First provided that creditors by judgment should only come in ratably with the other creditors under a commission, and this was carried still farther by the act of George the Fourth and a latter act,(e) which confined the right to an execution before the bankruptcy.(1) In general, therefore, judgments *against a bankrupt were not material where the estate was sold by his assignees.

49. In a case(f) where a man sold a freehold estate, and the

(b) *Supra*, ch. 9.

(d) 1 & 2 Vict. c. 110, s. 16.

(c) *Hodges v. Ld. Litchfield*, 1 Bing. N. C. 499.

(e) 6 Geo. 4, c. 16, s. 108; 12 & 13 Vict. c. 106, s. 184, which section is not repealed by 24 & 25 Vict. c. 134; see *Sched. G.*; *Holmes v. Tutton*, 24 L. J. N. S. 346; 6 Will. 4, c. 14, s. 126; 12 & 13 Vict. c. 107, Ireland; *Sawyer v. Norris*, 7 Ir. Ch. R. 314.

(c¹) [In Massachusetts and Maine a judgment is presumed to be rendered on the last day of the term, unless there is some special entry to the contrary. *Herring v. Polley*, 8 Mass. 113; *Portland Bank v. Maine Bank*, 11 Mass. 204; *Chase v. Gilman*, 15 Maine, 64.]

(f) *Sloper v. Fish*, Rolls, 29 July, 1813; 2 Ves. & Bea. 145; *Baldwin v. Belcher*, 1

(1) The provision in 12 & 13 Vict. c. 106, s. 184, is that no creditor having security for his debt, or having made any attachment by virtue of a custom of the goods and chattels of a bankrupt, shall receive upon any such security or attachment more than a ratable part of such debt, except in respect of any execution or extent served and levied by seizure and sale upon any mortgage of or lien upon any part of the property of such bankrupt, before the date of the fiat or the filing of a petition for adjudication, with provisoes as to the invalidity of warrants of attorney and judgments under them according to other provisions in the act.

conveyance was executed by the material parties, but no part of the money was paid, and the conveyance remained in the seller's hands; and in this stage a commission issued against him, but judgments had been entered up against him previous to the bankruptcy; the purchaser required satisfaction to be entered up on the judgments, upon the ground that the statute did not apply to this case, as the sale was not by the assignees, and it was a concluded transaction. The demand was resisted on the ground that by the statute of James 1 the judgment debts were reduced to a level with the simple contract debts, for the object of that statute was to put all the creditors on an equality.^(g) Now, it was clear that the seller had an equitable lien on the land for its whole value, and that the money would go to the assignees; and consequently, if the judgment creditors could execute their judgments against the purchaser they would obtain a preference over the other creditors; for, of course, the purchaser was not to pay his money, and also be liable to the judgments. The case of *Orlebar v. Fletcher* (^h) appeared to be a stronger case against the judgment creditors than the present, for there the purchaser had paid the greater part of the purchase money before the bankruptcy; and although, in the present case, the conveyance was executed, yet it was not delivered, and therefore might be considered as an escrow; (ⁱ) and even if it operated to vest the legal estate in the purchaser, yet the case was within the spirit and meaning of the act of James; because the estate in effect formed part of the property to be distributed. Upon these grounds the assignees filed a bill against the purchaser for a specific performance; but the master of the rolls thought the title too doubtful to enable him to force it on the purchaser.

50. However, where a man agreed to sell his estate, and became a bankrupt before the conveyance was executed, the same learned judge held that the assignees of the seller could make a title without the concurrence of judgment creditors before the bankruptcy.^(k)

J. & L. 18; *White v. Baylor*, 4 Dru. & War. 297. 360; *O'Dell v. Wake*, 3 Ca. 394, where the deed was in the possession of the purchaser's solicitor.

(g) *Newland v. —*, 1 P. Wms. 92.

(h) 1 P. Wms. 737.

(i) *Derby Canal Co. v. Wilmot*, 8 East,

(k) *Sharpe v. Roahde*, 2 Ro. 192

51. But although judgments against bankrupts were by the former law cut down to a level with the other debts, and therefore generally where assignees sold the estate it was immaterial whether or not there were judgments against the bankrupt; yet the late act, in *making the judgment debts an actual charge on the estate, provides that such charge shall not operate to give the judgment creditor any preference in case of the bankruptcy of the person against whom such judgment shall have been entered up, unless such judgment shall have been entered up one year at least before the bankruptcy; (l) in that case, therefore, it will still operate as a judgment, and consequently judgments should now be searched for against a bankrupt where the sale is by his assignees: subject to this limit, the cases before quoted would apply to the new enactments.(m)

52. After the estate of an insolvent debtor was vested in the provisional assignee, a creditor who had obtained a judgment by virtue of a warrant of attorney was prevented from availing himself of any execution issued upon such judgment against the property of such prisoner; (n) but this was held to apply to personal estate only, and therefore judgment creditors of an insolvent, although the judgments were obtained under warrants of attorney, were necessary parties to a conveyance to a purchaser; (o) but this provision as to insolvents has been repealed.(p)

53. As the object of the act of William & Mary was to enable purchasers to discover judgments by the names of the persons against whom they were entered, if the name of a defendant were falsely entered, as Compton for Crompton, the judgment was void against purchasers, and the court would not amend the record.(q) And this rule would prevail upon the new acts. But a judgment registered by the correct name is valid

(l) 1 & 2 Vict. c. 110, s. 13; *inf.* ch. 22, for the provisions in the new consolidated bankrupt law.

(m) *Ex parte Boyle*, 17 Jur. 979. [See *Matter of Cook*, 2 Story, 376, and cases cited *ante*, 523, n. (k), in regard to attachments on mesne process as affected by the bankrupt laws of the United States. *Bates v. Tappan*, 99 Mass. 376; *Bowman v. Harding*, 56 Maine, 559.]

(n) 1 & 2 Vict. c. 110, s. 61.

(o) *Hotham v. Somerville*, 9 Beav. 3; *Robinson v. Hedger*, 13 Jur. 846, where the judgment was entered up before the mortgage.

(p) 24 & 25 Vict. c. 134; see Sched. G.

(q) *Sale v. Crompton*, 1 Wils. 61; 2 Str. 1209.

against purchasers, although in the action and judgment the Christian name was erroneously stated.(*r*)

54. A purchaser of part of an estate, subject to a judgment, if execution be sued against him only, shall have contribution against the persons seised of the residue of the estate, left in the hands of the conusor, whether they acquired it by descent or purchase.(*s*)

55. Sir Edward Coke observes,(*t*) that when it is said that if one purchaser be only extended for the whole debt, that he shall have contribution, it is not thereby intended that the others shall give or allow to him anything by way of contribution; but it ought to be intended, that the party who is only extended for the whole, may, by *audita querela*, or *scire facias*, as the case requires, defeat the * execution, and compel the conusor to sue execution of the whole land; so, in this manner, every one shall be contributory, *hoc est*, the land of every terre-tenant shall be equally extended. The statute 16 & 17 Car. 2, c. 5, has enabled the conusee to proceed against any part of the land, but it saves the right to contribution against the person whose lands are not extended, without pointing out how that right is to be enforced. In some cases, doubtless, the relief would be in equity.(*u*)

56. The court or a judge may order a memorandum of satisfaction to be entered upon the record of any judgment if it shall clearly appear to them that the debt and damages have been fully discharged.(*x*) We must bear in mind that the distinction between traders and non-traders has been abolished as regards liability to bankruptcy, and that every debtor may be made a bankrupt if he commit an act of bankruptcy according to his class.(*y*)

57. In addition to inquiries after any adjudication in bankruptcy, it may be proper to search the bankrupt court for any affidavits of debt by creditors, which may be made the foundation of an adjudication. Where a man has been adjudged a bank-

(*r*) *Beavan v. Ly.* Oxford, 3 Sm. & Gif. 11; 3 Eq. R. 445.

(*s*) *Sir Wm. Herbert's case*, 3 Co. 11 *b*; *Blakeston v. Martyn*, 1 Jo. 90; *Hartly v. O'Flaherty*, Beat. 61; *Aicken v. Macklin*, 1 Dru. & Wal. 621; s. 13 of 1 & 2 Vict. c. 110.

(*t*) 3 Co. 14 *b*.

(*u*) *Hartly v. O'Flaherty*, Beat. 61; 1 Llo. & Go. t. Plunk. 208; 1 & 2 Vict. c. 110, s. 13; *post*, ch. 23.

(*x*) 16 & 17 Vict. c. 113, s. 144; as to attaching judgment debts, see 17 & 18 Vict. c. 125, s. 60-67.

(*y*) 24 & 25 Vict. c. 134, s. 69.

rupt, there is but little danger of its not being known : and now all conveyances by any bankrupt *bonâ fide* made and executed before the date and issuing of the adjudication against such bankrupt, will be valid, notwithstanding any prior act of bankruptcy by him committed, provided the person or persons to whom the bankrupt so conveyed had not, at the time of such conveyance, notice of any prior act of bankruptcy by him committed. (z) This is a necessary provision now that a man may so readily be made a bankrupt, and that he himself may, by a simple declaration that he is unable to meet his engagements, commit an act of bankruptcy, upon which an adjudication may follow. (a) The notice in the act means knowledge. (b)

58. It may, in this place, be observed, that provision is made by the statutes of bankruptcy (c) for the enrolment of the proceedings for the safety of purchasers; and it is declared, that no fiat, nor any *adjudication of bankruptcy or appointment of assignees, or certificate of conformity under such fiat, shall be received in evidence in any court of law and equity, unless the same shall have been first entered of record in the court of bankruptcy. (e) This, therefore, renders it necessary that the petition, adjudication, and certificate of the appointment of assignees, should be entered of record at the seller's expense. But where the bankrupt joins in the conveyance, either voluntarily or compulsorily, by the direction of the court, (f) and there is no reason to suppose that the adjudication will be disputed by third persons, this cannot be necessary; nor could it be required where it has been omitted, and it has become too late to upset the bankruptcy. The proceeding for adjudication in bankruptcy is by petition, and when there is a former mention of a fiat in bank-

(z) 2 Vict. c. 11, s. 12, and see s. 13; 27, 29; 2 & 3 Will. 4, c. 114; 12 & 13 2 & 3 Vict. c. 29; 12 & 13 Vict. c. 106, s. 133, see s. 134, as to notice after twelve months, which sections are not repealed by 24 & 25 Vict. c. 13, s. 4, see Sched. G.; *Meux v. Smith*, 11 Sim. 410.

(a) 6 Geo. 4, c. 16, s. 6; 1 & 2 Will. 4, c. 56, s. 42; 12 & 13 Vict. c. 106; 24 & 25 Vict. c. 134, s. 72.

(b) *Bird v. Bass*, 6 Man. & Gra. 143.

(c) 5 Geo. 2, c. 30, s. 41; 6 Geo. 4, c. 16, s. 96, 97; 1 & 2 Will. 4, c. 56, s. 13,

27, 29; 2 & 3 Will. 4, c. 114; 12 & 13 Vict. c. 106, s. 89. As to proof of title under the insolvent acts, *Doe v. Evans*, 1 Cr. & M. 450; 7 Ad. & El. 909; the insolvent court is now abolished, 24 & 25 Vict. c. 134, s. 19, 20.

(e) 2 & 3 Will. 4, c. 114, s. 8; 12 & 13 Vict. c. 106, s. 236, which is not repealed; 24 & 25 Vict. c. 134, s. 203-210.

(f) 6 Geo. 4, c. 16, s. 78; 12 & 13 Vict. c. 106; *Ex parte Thomas*, 2 Gly. & Ja. 278; 1 Mon. & M'Ar. 64.

ruptcy, or commission in bankruptcy, the act or proceeding in which such mention is made, is to be construed as though such fiat or commission had been a petition in bankruptcy under the new act so far as may be.(g)

59. And by the 5 & 6 Vict. c. 116, certificates of appointments of assignees are required to be registered in England or Ireland, where by law any conveyance or assignment of any property of a petitioner would require to be registered. But it is provided that the title of any purchaser for valuable consideration, who shall have duly registered his deed previous to the registry thereby directed, shall not be invalidated by reason of the appointment of an assignee, or consequent thereon, unless the certificate shall be registered within two months from the date of such appointment.(h)

60. Where a man, formerly a bankrupt, sells after-acquired property, having obtained his certificate, the certificate of conformity should be enrolled.

61. In the same office in the C. P., where judgments are to be searched for, will be found a list of such causes or informations as are intended to bind purchasers by the doctrine of *lis pendens*. And the filing of a special case, and the entering of appearances thereto by the persons named as defendants therein, are to be taken to be *lis pendens*.(i) And no purchaser or mortgagee, without express notice of a *lis pendens*, will be bound by it, unless and until a memorandum or minute containing the name and the usual or last known place of * abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the court of equity, and the title of the cause or information, and the day when the bill or information was filed, is left with the senior master of the C. P., who is to enter such particulars in a book, in alphabetical order; and there must be a

(g) 24 & 25 Vict. c. 134, s. 86, 87, & s. 229, meaning of "Petition for adjudication," or "Petition in bankruptcy," 12 & 13 Vict. c. 106, s. 89, not repealed.

(h) S. 8; 12 & 13 Vict. c. 106, s. 143, which is not repealed.

(i) 13 & 14 Vict. c. 35, s. 17; see as to petitions in the Irish court of chancery, 13 & 14 Vict. c. 89, s. 42; and 13 & 14

Vict. c. 29, s. 5, as to reregistering a *lis pendens* in Ireland; and as to priority of a registered judgment over a prior unregistered equitable mortgage, see *In re Hamilton's Est.* 9 Ir. Ch. R. 512. [See *Haughwout v. Murphy*, 6 C. E. Green (N. J.), 118; 1 Dan. Ch. Pr. (4th Am. ed.) 400, 401.]

reëntry every five years; (*k*) and the provisions relating to re-registering judgments every five years extends to *lis pendens*; (*l*) and all the provisions equally apply to the counties palatine. (*m*) This list, therefore, should also be searched, and that may render it necessary to call for the proceedings in any pending suit or information. (*m*¹)

62. There will likewise be found in the same office an index to debtors and accountants to the crown, which, of course, should also be searched. The book will be found to contain a list of the judgments, statutes, or recognizances to the crown, inquisitions of debt due to the crown, obligations or specialties made to the crown under the 33 H. 8, c. 39; acceptances of office which bind the officers' land, under the 13 Eliz. c. 4, with all requisite particulars. (*n*) And where a quietus has been obtained by a debtor or accountant to the crown, it will probably be found in the list. (*o*) Reregistry was originally not required, but now crown debts and obligations are placed as to reregistry on the same footing with common judgments in order to bind purchasers, mortgagees, or creditors, becoming such after the 31st December, 1859. (*p*)

63. But this provision is only prospective, and therefore a purchaser must still ascertain, as well as he can, whether there are any crown debts, &c., created or secured before the act passed, viz., the 4th June, 1839, although time has rendered this unnecessary in most cases.

64. This list of crown debts should, in every instance, be searched, where there is any reason to suppose that the seller is a crown debtor; (*q*) even a prior legal term of years assigned to

(*k*) 2 Vict. c. 11, s. 7; 7 & 8 Vict. c. 90, s. 10 (Ireland); *Jennings v. Bond*, 2 J. & L. 720.

(*l*) 2 Vict. c. 11; a winding-up petition is a *lis pendens* requiring registration under the act 11 & 12 Vict. c. 45, s. 125; see 25 & 26 Vict. c. 89.

(*m*) 18 Vict. c. 15, s. 3.

(*m*¹) *Post*, 758, note.

(*n*) 2 Vict. c. 11, s. 7; 7 & 8 Vict. c. 90, s. 11 (Ireland).

(*o*) S. 9; *Ex parte Fleetwood*, 4 Man. & Gra. 640; see 18 Vict. c. 15, s. 11; 7 & 8

Vict. c. 90, s. 13 (Ireland). This act gives no priority to judgments *inter se*; *M'Minn v. M'Connell*, 2 Ir. C. R. 609. For what the memorandum of registry should contain, see *In re Boates' Estate*, 9 Ir. Ch. R. 524.

(*p*) 22 & 23 Vict. c. 35, s. 22; sup. ch. 12, s. 4, and the provisions of s. 195, 196, 197 of 16 & 17 Vict. c. 107, are extended to all bonds and other securities entered into or given to the crown; 23 & 24 Vict. c. 115, s. 1.

(*q*) *Post*, ch. 22.

a trustee for the purchaser to attend the inheritance, could not be relied upon although he purchased without notice ; (r) but where the term never * was held in trust for the crown debtor, it might have been used as a defence against the crown debt. (s) But, as we have before observed, the protection afforded by a term for years will soon cease. (t)

65. And where a man is an accountant to the crown, even his future debts would bind the estate which he had at the time he was such accountant in the hands of a purchaser. (u) The same doctrine, it has been observed, holds in respect to the debts of persons who have executed bonds to the crown to account for the money coming to their hands as receivers. It follows that all their lands are chargeable to the crown from the execution of the bond, and consequently, though they sell them to a purchaser at a time when they are not indebted, and have no money belonging to the crown in their hands, still the lands are liable to the crown for their future debts ; and, generally speaking, the same observation applies equally to the sureties for the debtor to the crown as to the debtor himself. (x) In these cases, therefore, a quietus should be entered upon record.

66. But if the estate is sold under a writ of extent, or by the court of the chancery or exchequer, and the purchase money is paid into the receipt of the king's exchequer, under the 1 & 2 Geo. 4, c. 121, that will absolve the purchaser. (y) And now the treasury is authorized, upon payment of such sums as they may think fit to require into the exchequer, to be applied in liquidation of the debt or liability of any debtor or accountant to the crown, or upon such other terms as they may think proper, to exonerate the purchaser from the debt or liability to the crown, and this is extended to leases for fines, reserving to the crown the right to the rent and reversion, and enabling the crown to recover against the other lands liable to the demand. (z)

(r) *Rex v. Smith*, *inf.* ch. 16.

(s) *Rex v. Lamb*, 13 Pri. 649.

(t) 8 & 9 Vict. c. 112 ; *sup.* ch. 12.

(u) 13 Eliz. c. 4 ; Sir C. Hatton's case, 10 Rep. 55 b, cited ; *Nicholls v. How*, 2 Ver. 389 ; 25 Geo. 3, c. 35.

(x) *Co. Litt.* 209 a, n. 1 ; 191 a, n. 1, s. 5, div. 9. As to bankrupts, 12 & 13 Vict. c. 106, s. 127.

(y) In a sale under 25 Geo. 3, c. 35, the benefit of an investment of the purchase money was held not to belong to the crown beyond the debt, with interest and costs ; *Rex v. De la Motte*, 2 H. & N. 589.

(z) 2 Vict. c. 11, s. 10, 11 ; 7 & 8 Vict. c. 90, s. 14, 15 (Ir.).

67. The 16 & 17 Vict. c. 107,(a) in dealing with bonds given for matters relating to the customs, provides that where such bonds shall have been registered in the C. P. in England, or in the office of the registrar of the judgments in Ireland, and the conditions of the bond shall have been satisfied, the commissioners of customs by certificate may order satisfaction to be entered up thereon on the record; and upon satisfaction being entered up the bond shall be discharged, and the lands thereby affected shall be exonerated from all claims in respect thereof.(b) And the act further provides that *where such bonds are registered in England under the 2 Vict. c. 11, or in Ireland under 7 & 8 Vict. c. 90, the aforesaid commissioners may, in their discretion, exonerate the whole or any part of the bond of any obligor from liability in respect thereof by certificate, first requiring the consent of any coobligor if they shall deem it necessary, and thereupon the lands mentioned in such certificate shall be held wholly exonerated from all liability in respect of such bond, and every such certificate shall be accepted by all persons and in all courts as sufficient evidence of such exoneration.(c) But in this case, as there is no satisfaction of the bond, no registry is required. These several provisions concerning bonds and other securities relating to the customs have *mutatis mutandis* been extended to all bonds and other securities given to the queen, her heirs, or successors, and proper provisions have been made for certificates to be given by the heads of departments, or, if none, by the treasury.(d)

68. It has been determined, that in the case of a purchase for a valuable consideration without notice, and without fraud or covin, from a simple contract debtor of the king, whose debt was not recorded until after the conveyance, the lands are not bound by such simple contract debt.(e) If, as the court observed, an

(a) S. 195.

(b) S. 196.

(c) S. 197; s. 198, provides for the punishment of false declarations, &c.

(d) 23 & 24 Vict. c. 115, s. 1.

(e) The King v. Smith, Wight. 34. In that case the general words in the statute 13 Eliz. c. 4, received a limited and proper construction. In *Wilde v. Fort*, 4 Taunt.

334, in which it was not necessary to decide the point, the rule was laid down with too much latitude, that any person who has received money belonging to the crown, every accountant of the crown for money of the crown received, falls within the act; see *Casberd v. Ward*, 6 Pri. 411, 477.

individual holding no office known to the public to be an accountable office, casually received part of the king's treasure, and thereby bind his land in the hands of a *bond fide* purchaser without notice, there would be a universal suspicion of all titles, because it will be impossible to discover who are the persons that may have privately got the king's money into their hands.(f)

69. In the case in which this point was decided, the purchaser bought without notice, and that fact is relied upon with the others in the judgment of the court, but as the simple contract debt does not bind the lands in the hands of a purchaser, it must be indifferent whether he buys with or without notice, provided there was no fraud or covin.

70. A parish collector of taxes, although he is liable to the process of the crown in respect of the money which he has received as such collector, is not that kind of debtor to the crown which would bind his lands so as to affect the existing equitable or legal interest of any third person in them. He is not a debtor to the crown of record, nor one of the persons described in the 13th Eliz., nor does * he give bond to the crown, but he is merely an ordinary simple contract debtor, and the crown has no right to his estates until he becomes a debtor by record, which he will be when an inquisition is taken.(g)

71. A purchaser should also search the court of chancery for statute deeds, as substitutes for fines and recoveries, and also the index in the common pleas for the certificates of acknowledgments of deeds of husbands and wives, which index contains the names of married women and their husbands, alphabetically arranged.(h)

72. If the estate lie in a register county, the registrar's office should be searched, for the purpose of ascertaining not only that the estate is free from incumbrances, but also that the title deeds are duly registered; the estate may be lost by neglecting to do so.(h¹) And if it appear that any deed has not been duly regis-

(f) Wight. 49.

(g) *Casberd v. Att. Gen.* 6 Price, 411, 473; *Fector v. Phillpott*, 12 Price, 197. [But in Massachusetts, and some other States, taxes assessed on real estate, are made a lien thereon, for the payment

thereof, during a certain period specified in the statutes.]

(h) 3 & 4 Will. 4, c. 74, s. 87.

(h¹) [See *ante*, 433, note, *post*, 726, note; *Jolland v. Stainbridge*, 3 Ves. (Sumner's ed.) 478, in note (1). The rule in the

tered, the vendor must procure it to be registered at his own expense, previously to the completion of the contract; although, indeed it sometimes happens that an instrument not being registered, prevents an objection being made to the title. To give an instance of this, let us suppose a man to have mortgaged his estate, and paid off the money, but to have neglected to take a reconveyance. Now, if the mortgage was not registered, the purchaser need not insist upon its being registered, and require a reconveyance from the mortgagee; because, as the deed was not registered, the mortgagee did not acquire the legal estate, or if he did, would cease to have it by the registry of the conveyance to the purchaser; and, being paid off, he has of course no equity. So where a partial interest in an estate is devised to the heir at law, with a power of leasing, and he grant a lease not authorized by his power, the lease may, in some cases, be sustained both at law and in equity, in case the will was not registered according to the act. This, however, is a mode of making a title to which necessity only should compel us to resort. The registry acts apply to appointments of official managers under the winding-up act, whereupon the estates of the companies vest in the manager, and the titles of purchasers and mortgagees who have previously registered are preserved.⁽ⁱ⁾

73. A purchaser from a devisee should not complete his contract till the will is duly registered, unless the vendor be both heir at law and devisee, or the estate is leasehold, and the seller is entitled either as executor or legatee.⁽ⁱ⁾

74. And if a purchaser be already seised of the legal estate, as if he be mortgagee in fee, and has contracted for the equity of redemption, it is not actually necessary to search the register if he be * assured that notice cannot be proved either on himself or on any one concerned for him.

75. Where the estate lies in Middlesex, judgments need only be searched for at the registrar's office, but where the estate lies in York, or Kingston-upon-Hull, recent judgments must be

text would be general in the United States, tit. 32, ch. 29, § 1, note, § 20, note, vol. 4, where provision is universally made for pp. 545, 555.]

the registry of deeds, 4 Kent (11th ed.), (i) 11 & 12 Vict. c. 45, s. 1 29, and see s. 456; 2 Cruise, Dig. by Mr. Greenleaf, 68; 25 & 26 Vict. c. 89.

(i) [Post, 727, note.]

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searched for in the proper courts. And since the 1 & 2 Vict. c. 110, it would not be prudent to dispense with such a search as regards Middlesex. Upon the purchase of a leasehold estate in a register county, not only the register, but also the proper courts should be searched.

76. The register ought to be searched immediately before the execution of the conveyance, for the same reason that the search for judgments should be delayed till the last moment.

77. And lastly, grants of annuities should be searched for, because any annuities duly granted would of course bind him, unless he could protect himself by a prior legal estate. In a register county they need only be searched for at the registrar's office. By the 17 & 18 Vict. c. 90, repealing the usury laws, the act requiring grants of life annuities to be enrolled has been repealed; but by a later act, they are still required to be registered as a safeguard to purchasers, inasmuch as the grantee of such an annuity rarely has possession of the title deeds.^(k) The register will not show upon what lands the annuities are charged, but a purchaser would of course require the seller to produce the grants.^(k¹)

78. If a purchaser is damnified by his solicitor neglecting to search for incumbrances, he may recover at law against the solicitor, for any loss occasioned by his negligence.^(l) So if a solicitor of a vendor, being a mortgagee with a power of sale, advise his client, after selling to pay any part of the purchase money to a party not entitled, with a view to his own benefit, he may be compelled by equity to make good the loss.^(m) And this relief is carried much further.⁽ⁿ⁾

79. So if the chief clerk, whose duty it is to enter up and docket judgments, neglect to do so, by which a purchaser who

(k) 18 Vict. c. 18, s. 12.

(k¹) [Mechanics' liens, liens for damages assessed under flowage acts, liabilities of estates of deceased persons for payment of debts, liens for taxes, homestead rights, and all other statute incumbrances, need the careful attention of conveyancers and others examining into titles to real estate.]

(l) Brooks v. Day, 2 Dick. 572; For-

shall v. Cole, 7 Vin. Ab. 6, pl. 65, MS.; and Purch. App. No. 18; Green v. Jackson, Peak. 236; Ireson v. Pearman, 3 Bar. & Cres. 799; 5 Dow. & Ry. 687; see Baikie v. Chandless, 3 Ca. 17; Templer v. M'Lachlan, 2 New R. 136; Parker v. Rolls, 14 C. B. 691.

(m) Rew v. Lane, 3 Jur. N. S. 125.

(n) Craig v. Watson, 8 Beav. 427; Cleland v. Leech, 5 Ir. Ch. R. 478.

has made the proper searches sustains any loss,(o) he has a remedy against the clerk by an action on the case.(p) And any person who is damnified by the neglect of the registrar of either of the registering counties, may bring an action against him, in which he will recover treble damages and costs of suit, by virtue of the registering acts.

* 80. Where the estate is in the possession of a tenant, inquiry should be made of him in regard to the terms of his tenancy, and whether he holds any agreement for purchase of the estate. This is not often done, but upon purchases of small properties it should rarely be neglected, as notice of the tenancy is notice of the tenant's rights.(p¹)

SECTION II.

OF RELIEF FROM INCUMBRANCES.

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| <ol style="list-style-type: none"> 1. Seller to pay off incumbrances. 2. Unless purchaser has agreed to accept a covenant. 3. Purchaser may recover, though money paid, if conveyance not perfected. 4. Eviction after conveyance not relieved against. 7. <i>Urmston v. Pate</i>. 8. Title under forged instrument. 9. <i>Matthews v. Hollings</i>; erroneous. 10. Neglect of purchaser. 11. Legacy a charge unpaid; remedy. 12. Covenants of earlier vendors. 13. No relief though money secured. 14. Or sale by the court. 15. Unless in case of misrepresentation. 16. <i>Tourville v. Nash</i>. 17. Concealment of defect in title. 18. Purchase with all faults of title. 19. Issue directed. | <ol style="list-style-type: none"> 20. Relief where concealment. 21. No lien on purchase money after appropriation. 22. Fund appropriated against a claim, liable for the real claim. 23. Payment by purchaser to a creditor of vendor. 24. Purchaser puisne mortgagee, and purchase money insufficient to clear the estate. 25. Purchase of incumbrances by third person. — How far binding on purchaser. 26. Purchase of incumbrances by purchaser of estate. 27. Misrepresentation that mortgage money is charged on other property. 28. Succession duties: liability of purchaser. 29. Seller buying in interests after conveyance, a trustee for purchaser. |
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1. WHERE an incumbrance is discovered previously to the execution of the conveyance, and payment of the purchase money, the vendor must discharge it, whether he has or has not

(o) See *M'Minn v. M'Connell*, 2 Ir. Ch. R. 609.

(p) *Douglas v. Yallop*, 2 Bur. 722.

(p¹) [*Post*, 762, & notes.]

agreed to covenant against incumbrances, before he can compel payment of the purchase money.(a)(1)

2. But if a purchaser has notice of an incumbrance *which is contingent*, and it is by the articles agreed that the vendor shall covenant * against incumbrances, the purchaser has chosen his own remedy ; (b) and he cannot, therefore, detain any part of the purchase money.

3. Although the purchaser has paid the money, yet if he is evicted before the conveyance is executed by *all* the necessary parties, he may recover the purchase money in an action for money had and received, although the intended covenants do not extend to the title under which the estate was recovered, and he may be in possession of the estate.(c)

4. Where the eviction of a leasehold estate (which had been sold, and the money paid, and possession delivered, but no assignment executed) was occasioned by the seller having taken out administration to the deceased owner by a wrong name, and another person having taken administration by the right name, the money was held to have been paid under a mistake, for both parties supposed the seller was the legal representative, and the purchaser was allowed to recover the purchase money.(d)

5. And where a man contracted for a copyhold estate for lives, and paid part of the purchase money, and was to pay the residue

(a) Anon. 2 Free. 106 ; Vane v. Ld. Barnard, Gilb. E. R. 6 ; Maynard's case, 2 Free. 1 ; 3 Swan. 651 ; see 1 Ves. 88 ; 2 Ves. 394 ; 2 Ves. jr. 441 ; 4 Bro. C. C. 394 ; Brown v. Stepney, Beat. 588. [See Westervelt v. Matheson, 1 Hoff. Ch. 97 ; Young v. Lilliard, 1 A. K. Marsh. 482 ; Ragan v. Gaither, 11 Gill & J. 472 ; Cullam v. Branch Bank, 4 Ala. 21 ; Thompson v. Christian, 28 Ala. 399 ; McCool v. Jacobus, 7 Rob. (N. Y.) 115 ; Cooper v. Singleton, 19 Texas, 260 ; Littlefield v. Tinsley, 22 Texas, 259. A vendee cannot insist upon a rescission on the ground of incumbrances, when he owes unpaid purchase money sufficient to discharge them. Irvin v. Bleakley, 67 Penn. St. 24.]

(b) Vane v. Ld. Barnard, *ubi sup.* ; Clarke v. Faux, 3 Russ. 320.

(c) Cripps v. Reade, 6 T. R. 606 ; Mathews v. Hollings, Woodfall's Land. & Ten. 35, cited ; Johnson v. Johnson, 3 Bos. & Pul. 162 ; Briggs case, Pal. 364 ; Jones v. Ryde, 1 Mars. 157 ; 5 Taunt. 488 ; Carter v. Uniacke, 4 Ir. C. R. 30. [See 2 Cruise Dig. by Mr. Greenleaf, vol. 4, tit. 32, Deed, ch. 26, § 90, & note.]

(d) Cripps v. Reade, 6 T. R. 606 ; Early v. Garrett, 9 B. & C. 928.

(1) In Robinson v. Anderson, Peak. 94, Lord Kenyon permitted a purchaser of fixtures in a house which were scheduled in the original lease, and belonged to the landlord, to recover the purchase money, although the person who sold them was an under-tenant, and had himself ignorantly paid for them.

on taking up the copy, but was guilty of laches, yet, upon the seller's death, when the manor went under a settlement to a remainder-man not bound by the contract, the purchaser was permitted to recover the money in equity.(e)

6. But if the conveyance has been actually executed by *all* the necessary parties, and the purchaser is evicted by a title to which the covenants do not extend, he cannot recover the purchase money either at law,(f) or in equity.(g)

(e) *Awbry v. Keen*, 1 Ver. 472.

(f) *Cripps v. Reade*; *Johnson v. Johnson*, *ubi sup.*; *Bree v. Holbeck*, Doug. 654.

(g) *Maynard's case*, 2 Free. 1; 3 Swan. 651; *Anon.* 2 Free. 106; *Tylee v. Webb*, 14 Beav. 14. [*Ante*, 251, note (x). In 2 Kent (11th ed.), 473, the learned author says: "I apprehend that in sales of land, the technical rule remits the party back to his covenants in his deed; and if there be no ingredient of fraud in the case, and the party has not had the precaution to secure himself by covenants, he has no remedy for his money, even on a failure of title. This is the strict English rule, both at law and in equity." See *Abbott v. Allen*, 2 John. Ch. 523; *Gouverneur v. Elmendorf*, 5 John. Ch. 84; *Frost v. Raymond*, 2 Caines, 188; *Cooper v. Singleton*, 19 Texas, 260; *Earle v. De Witt*, 6 Allen, 520; *Earle v. Bickford*, 6 Allen, 550; *Falconer v. Griffiths*, 3 Md. Ch. 151; *Falconer v. Clark*, 7 Md. 177; *Carr v. Roach*, 2 Duer (N. Y.), 20; *Smith v. Chaney*, 4 Md. Ch. 246; *Denston v. Morris*, 2 Edw. Ch. 37; *Miller v. Long*, 3 A. K. Marsh. 334; *Craddock v. Shirley*, 3 A. K. Marsh. 288; *Barkham v. Case*, 5 Conn. 528; *Morrison v. Caldwell*, 5 Monroe, 439; *Rawlins v. Timberlake*, 6 Monroe, 230; *Soper v. Stevens*, 14 Maine, 133; *Van Rensselaer v. Kearney*, 11 How. (U. S.) 322; *Hoppes v. Cheek*, 21 Ark. 585. The articles of agreement for the sale of the land are merged in the deed of conveyance which has been made, delivered, and accepted in pursuance thereof. *Jones v. Wood*, 16 Penn. St.

25; *Bull v. Willard*, 9 Barb. 641; *Witbeck v. Waine*, 16 N. Y. 532, 535; *Homes v. Barker*, 3 John. 506; *Williams v. Hathaway*, 19 Pick. 387; *Carter v. Beck*, 40 Ala. 599; *ante*, 56, 158, 326, note. "Where a deed is executed in pursuance of a contract for the sale of land, all prior proposals and stipulations are merged, and the deed is deemed to express the final and entire contract between the parties." *Per Cur.* in *Williams v. Hathaway*, 19 Pick. 488. A purchaser, after a conveyance has been executed by all necessary parties, has no remedy at law or in equity in respect of any defect either in the title to, or quantity or quality of the estate, which is not covered by the vendor's covenants. See *Lysney v. Selby*, Lord Ray. 1119; *Bree v. Holbeck*, Doug. 632 (case of an innocent transfer of a forged security); *Cottam v. E. C. R. Co.* 1 J. & H. 243 (a purchase under a deed partially forged); *Ex parte Swan*, 30 L. J. N. S. C. P. 113; *Taylor v. Midland R. Co.* 28 Beav. 287 (where the person whose name was forged in a transfer of shares obtained relief against the company). See, too, *Thomas v. Powell*, 2 Cox, 394; *Wakeman v. Duchess of Rutland*, 3 Ves. 233, 235; *McCulloch v. Gregory*, 1 K. & J. 291; *Newham v. May*, 13 Price, 749; *Bos v. Helsham*, L. R. 2 Exch. 72; *Carter v. Beck*, 40 Ala. 599. No action lies to recover back money paid as the consideration for a quitclaim deed which contains covenants of warranty against all persons claiming under the grantor, both parties having acted under the belief that the deed conveyed a valid title, al-

7. Therefore, where (*h*) A. bought an estate, to one moiety of which there was a clear defect of title, which his counsel had

though the title to the land described wholly fails from causes to which the covenants do not extend. *Earle v. De Witt*, 6 Allen, 520. The rule of law is the same where the deed is without covenants. *Soper v. Stevens*, 14 Maine, 133; *Emerson v. County of Washington*, 9 Greenl. 88; *Joyce v. Ryan*, 4 Greenl. 101; *Higley v. Smith*, 1 D. Chip. 409; *Kerr v. Kitchen*, 7 Barr, 486; *Gates v. Winslow*, 1 Mass. 65; *Boas v. Updegrove*, 5 Barr, 516; *Abbott v. Allen*, 2 John. Ch. 519; *Chesterman v. Gardner*, 5 John. Ch. 29; *Beele v. Seiveley*, 8 Leigh, 658; *Hershey v. Keemborts*, 6 Barr, 128; *Frost v. Raymond*, 2 Caines, 188; *Maney v. Porter*, 3 Humph. 347. In such cases the law leaves the parties where it finds them. It gives no aid to either. *Gates v. Winslow*, 1 Mass. 63, 64; *Soper v. Stevens*, 14 Maine, 135. And consequently, where a note was given in consideration of the conveyance of land by deed with the usual covenants of seisin and warranty, and the title to the land entirely failed, so that nothing passed by the deed, it has been held, in an action between the original parties to the note, that this was a complete defence to the action, and the plaintiff could not recover. *Rice v. Goddard*, 14 Pick. 293; *Frisbie v. Hoffnagle*, 11 John. 50; *M'Allister v. Reab*, 4 Wend. 483; *Steinhauer v. Witman*, 1 Serg. & R. 447; *Gray v. Handkinson*, 1 Bay, 278; *Bell v. Huggins*, 1 Bay, 327; *Chandler v. Marsh*, 3 Vt. 162; *Tillotson v. Grapes*, 4 N. H. 448; *Trask v. Vinson*, 20 Pick. 105, 110; *Tallmadge v. Wallis*, 25 Wend. 117; *Dorsey v. Jackman*, 1 Serg. & R. 42; *Noonan v. Lee*, 2 Black (U. S.), 499; *Cooper v. Singleton*, 19 Texas, 260; *Hurt v. Blackburn*, 20 Texas, 601; see *Cross v. Noble*, 67 Penn. St. 74, 78, cited *ante*, 251, note; *Knepper v. Kurtz*, 58 Penn. St. 480. But in order to make a failure of title a good defence in any case it must be *total*; a *partial* failure is not sufficient. *Jenness v. Parker*, 24

Maine, 289; *Wentworth v. Goodwin*, 21 Maine, 150; *Greenleaf v. Cook*, 2 Wheat. 13; *Howard v. Witham*, 2 Greenl. 390; *Chase v. Weston*, 12 N. H. 413; see *Knapp v. Lee*, 3 Pick. 452; *Lloyd v. Jewell*, 1 Greenl. 352; *Coster v. Monroe Manuf. Co.* 1 Green Ch. 467; *Clafin v. Godfrey*, 21 Pick. 9; *Owings v. Thompson*, 3 Scam. 502; *Beaupland v. McKeen*, 28 Penn. St. 124. Where a conveyance was made of a parcel of land entirely different from that bargained for, and supposed by the parties to be embraced in the deed, which was a quitclaim deed, and a note was given for the purchase money, and the vendee executed and tendered a reconveyance of the estate, the court enjoined the vendor against prosecuting an action at law pending on the note. *Spurr v. Benedict*, 99 Mass. 463; *ante*, 248, note. See *Gardner v. Troy*, 26 Barb. 423; *Martin v. McCormick*, 4 Selden, 331; *D'Utricht v. Melchor*, 1 Dall. 428. In some cases it has been held that, although in an action to recover the purchase money of an estate, an eviction is not necessary for a defence on failure of consideration by reason of a defect in the title where there has been no conveyance, yet, that an actual eviction is necessary to constitute a defence in such case, where a deed has been given and the vendee has entered into possession. The grantee not evicted, but remaining in undisturbed possession, must rely on his covenants, except in a case of fraud. *Heath v. Newman*, 11 Sm. & M. 201; *Feemster v. May*, 13 Sm. & M. 275; *Wiggins v. McGimpsey*, 13 Sm. & M. 532; *Peques v. Mosby*, 7 Sm. & M. 340; *Dennis v. Heath*, 11 Sm. & M. 206; *Gilpin v. Smith*, 11 Sm. & M. 109; *Parham v. Randolph*, 4 How. (Miss.) 435; *Liddell v. Sims*, 7 Sm. & M. 596; *Green v. McDonald*, 13 Sm. & M.

(*h*) See 3 Ves. 235; 2 Bos. & Pul. 23; *Craig v. Hopkins*, 2 Coll. Decis. 517, 518.

overlooked, and he was afterwards evicted; he filed a bill asserting his claim to be repaid a moiety of the purchase money, although the covenants for title did not extend to the eviction, but the bill was dismissed: (*h*¹) William Davy devised the estate in question to Sir Robert Ladbroke and Lyde Brown, as tenants in common, in fee; and gave all the residue of his real estate to his brother, William Pate, in fee. Sir Robert Ladbroke died in the testator's lifetime. Robert Pate, as devisee of William Pate, the residuary devisee, conceived himself to be entitled to the moiety devised to Sir Robert Ladbroke, which became lapsed by his death, in the testator's lifetime, and accordingly * Robert Pate joined with the persons entitled to the moiety devised to Lyde Brown in selling the estate to one Urmston. *The conveyance recited the will of William Davy, and all the subsequent instruments*, and a covenant was inserted for the title, notwithstanding any act done by Robert Pate, or his ancestors, or any person claiming under him or them. The purchaser finding Robert Pate had no title to the moiety over which he assumed a power of disposition, but that it had descended to the heir at law of William Davy, filed his bill, praying that the purchase money might be restored to him. Robert Pate, the vendor, demurred to the bill for want of equity, and the demurrer was allowed. (*i*)

8. And it is immaterial that the seller had no interest whatever to transfer; as where a mortgage, which had been forged, was transferred by the personal representative of the mortgagee to a person who advanced the money alleged to be due upon it, and the assignment contained only limited covenants, the assignee was not allowed to recover his money back; it being incumbent on him to look to the goodness of the title. (*k*)

445; *Hoy v. Taliaferro*, 8 Sm. & M. 727; 19 Md. 296; *Tunc v. Rector*, 21 Ark. 283; *Abbott v. Allen*, 2 John. Ch. 519; *Bumpus v. Platner*, 1 John. Ch. 213; 2 Kent (11th ed.), 471, 472; *Johnson v. Gere*, 2 John. Ch. 547; *Yancey v. Lewis*, 4 Hen. & M. 390; *Wiley v. Fitzpatrick*, 3 J. J. Marsh. 584; *Anderson v. Lincoln*, 5 How. (Miss.) 279; *Coleman v. Rowe*, 5 How. (Miss.) 460; *Whitney v. Lewis*, 21 Wend. 132; *Tallmadge v. Wallis*, 25 Wend. 117; *Elliott v. Thompson*, 4 Humph. 99; *Vining v. Leeman*, 45 Ill. 246; *Mecklem v. Blake*, 22 Wis. 498; *Tims v. Shannon*,

Maxfield v. Bierbauer, 8 Min. 413.]

(*h*¹) [*Ante*, note (*g*) above.]

(*i*) *Urmston v. Pate*, 1 Trea. Eq. 364, n.; 4 Cruise, Dig. 90.

(*k*) *Bree v. Holbech*, Doug. 654; see 1 Mars. 163, 164; see *Cottam v. East*. Count. Ry. Co. 1 J. & H. 243; *et infra*, purchase under a deed partially forged; see *Ex parte Swan*, 30 L. J. N. S. C. P. 113; *Taylor v. Mid. Ry. Co.* 28 Beav. 287, as to relief against the company by the person whose name was forged. [*Ante*, 251,

9. This appears to have been overlooked in a case at nisi prius, before Laurence J.,^(l) where a purchaser of a lease, who obtained an absolute assignment of it, was evicted two years afterwards, in consequence of the lessor having been only tenant for life, and having died, and he was allowed to recover his purchase money upon the authority of *Cripps v. Reade*, where, as we have seen, *no assignment* had been executed, which is the distinction upon which these cases turn.

10. So, as we have seen, if a purchaser neglect to look into the title, it will be considered as his own folly, and he can have no relief.^(m)

11. Where a legacy was charged on an estate devised, but not personally on the devisee, and he sold the estate to a purchaser, neither of them noticing the legacy, which they appear to have treated as void in law, and the purchaser resold to another person, it was held, that, after the conveyance, the legatee had no remedy for the legacy against the devisee,⁽ⁿ⁾ the seller who did not receive the money to the use of the legatee, for the legacy was not recognized as a charge, nor did the devisee commit any fraud on the *legatee, nor could the purchaser call upon the seller, the devisee, to pay the legacy as between them, or to indemnify him, the purchaser, against it, as there was no fraud committed on him by the seller. But no doubt the seller would have been liable if he had fraudulently concealed the charge.^(o)

12. Where a purchaser has taken a defective title, and cannot recover against his immediate vendor, his only remedy is to have recourse to the covenants of the earlier vendors, many of which are inherent to the lands, and to some of which, as the covenant for quiet enjoyment, there is no objection, on account of their antiquity, where the breach is recent.^(p)

549. But in South Carolina, courts of equity will allow a party suffering by a failure of title, in a case without warranty, to recover back the purchase money, in the sale of real as well as of personal estate. *Tucker v. Gordon*, 2 Eq. Rep. (S. Car.) 53, 58; see *Hyne v. Campbell*, 6 Monroe, 233.]

^(l) *Matthews v. Hollings*, Woodf. Lan. & Ten. 35.

^(m) *Roswell v. Vaughan*, 2 Cro. 196;

Lysney v. Selby, 2 Ld. Ray. 1118; *Goodtitle v. Morgan*, 1 T. R. 755; *Anon.* 2 Free. 106; *Hitchcock v. Giddings*, 4 Price, 135; [*Patten v. Stewart*, 24 Ind. 332.]

⁽ⁿ⁾ *Jellard v. Edgar*, 3 De G. & Sm. 502.

^(o) *Newman v. Kent*, 1 Mer. 240; 3 De G. & Sm. 510, n.; *Ib.* 506.

^(p) *Butler's n.* (1); Co. Litt. 384 a. [See *post*, 577, n. (a).]

13. It seems, that if the conveyance be actually executed, the purchaser can obtain no relief, although the money be only secured; yet, in an early case, where A. had sold to B., with covenants, only against A., and all claiming by, from, or under him, and B. secured the purchase money; but before payment, the land was evicted by a title paramount to A.'s, the L. C. relieved from the payment of the purchase money.(q) If this case were law, the consequences would be serious: for what vendor would permit part of the purchase money to remain on mortgage of the estate, if he were liable to lose it, supposing the estate to be recovered by a person against whose acts he had not covenanted?(q¹) Indeed, this point is viewed so differently in practice, that where part of the purchase money is permitted to remain on mortgage, although the covenants from the vendor be limited, the vendee invariably enters into general unlimited covenants, in the same manner as he would have done in the case of an independent mortgage.

14. Even where an estate was sold before a master under a decree, and the purchaser had paid his money into the bank, but it was not to be paid out without notice to him, and he took possession and approved of the title, and the conveyance to him was executed by all necessary parties; but before the money was paid out of the bank, the tenants were served with a writ of right, at the suit of an adverse claimant; it was held that the money must be applied under the decree. The court having given the purchaser possession of the estate which he had purchased, and a conveyance under a title which he himself had previously approved, had done all it could for the purchaser, who could not afterwards object to the application of the purchase money.(r)

15. But this does not apply to a sale under the court, where the *rent is misrepresented; for although the money be paid into court and possession be delivered, and a conveyance executed,

(q) Anon. 2 Ch. C. 19; Fonbl. n. (g); 1 Trea. Eq. 361 (2d ed.). [See *Bumpus v. Platner*, 1 John. Ch. 218.]

(q¹) [See *Coster v. Monroe Manuf. Co.* 1 Green Ch. 467. In this case, however, there was a covenant of warranty.]

(r) *Thomas v. Powell*, 2 Cox, 394; *M'Culloch v. Gregory*, 3 Eq. R. 495; *Miller v. Pridden*, 3 Jur. N. S. 78, which consider.

yet the court will give to the purchaser out of the funds in court, a compensation for the misrepresentation.(s)

16. In *Tourville v. Nash*,(t) where the purchaser had notice before his purchase of an equitable incumbrance, and paid part of the purchase money, and gave a bond for the residue, of course the incumbrancer obtained a decree against the purchaser, but Lord Hardwicke declared, that if the person who has an equitable lien gives notice before the actual payment of the money, it is sufficient, and though the purchaser had no remedy at law against the payment of the residue secured by the bond, yet he would be entitled to relief in equity on bringing his bill, now that he has notice of an incumbrance, under which circumstances the court would stop payment of the money due on the bond. This was extra-judicial, but if equity will fix a purchaser with notice before payment of the money secured, or, in other words, will not treat the security as money actually paid, it seems to follow that the purchaser should have equitable relief, where he had no notice until after the completion of the purchase by conveyance, part payment, and security of the rest. It does not appear by whom the equitable lien was created, nor was it important in the above case. If it were created by the seller, and the purchaser did not buy subject to it, the latter ought, upon equitable principles, to have relief against the money unpaid, where there has been no adverse right in it created in third parties, which might raise another question. Nor does this principle apply to a title really adverse to both the seller and purchaser. In Ireland, the dictum of Lord Hardwicke was followed in a case where the conveyance having been executed, and part of the purchase money paid, and the residue secured by bond, the purchaser obtained relief against the bond for the amount of head-rent due at the date of the conveyance. The arrear of head-rent was within the covenant against incumbrances, as appeared upon a trial at law directed by the court. The decree relieved the purchaser fully, although the jury had assessed the damages at a less sum. It is not stated whether the covenant against incumbrances extended beyond those of the seller's own creation, but it would seem that the arrears were due from his own de-

(s) *Cann v. Cann*, 3 Sim. 447; *Cooper v. Cooper*, 4 Ir. C. R. 75. (t) 3 P. Wms. 307.

fault.(u) The relief appears to have been properly administered.

17. Although the purchase money has been paid, and the conveyance is executed by all the parties, yet if the defect do not appear on the face of the title deeds, and the vendor was aware of the defect, and concealed it from the purchaser, or suppressed the instrument *by which the incumbrance was created, or on the face of which it appeared, he is in every such case guilty of a fraud,(x) and the purchaser may either bring an action on the case, or file his bill in equity for relief.(y) In *Bree v. Holbech*, Lord Mansfield said that if the personal representative had discovered the forgery, and had then got rid of the deed as a true security, the case would have been very different.

18. But in a case where a purchaser bought and obtained a conveyance of an estate *with all defects and faults of title*,(z) and the seller stated that no rent had ever been paid, which turned out to be false, and the title being merely under a lease, the lessor recovered the estate; yet as the jury found that the seller really believed that no rent had ever been paid, the statement, though false in fact, was held not to be fraudulent, and the purchaser although he lost the estate, was not allowed to recover the purchase money. The *scienter* or fraud is the gist of the action where there is *not* a warranty.(a)

19. Where a bill is filed against the vendor, and the court cannot satisfy itself of the fact, an issue will be directed to try whether the vendor did know of the incumbrance.(b)

20. In a case which we have already fully considered, where the sellers knew of a defect in the title to a part of the estate, which was material to the enjoyment of the rest, and did not disclose the fact to the purchaser, and it could not be collected

(u) *Woods v. Martin*, 11 Ir. Ch. R. 148.

(x) See *Harding v. Nelthorpe*, Nels. C. R. 118; 2 Free. 2.

(y) *Doug.* 654. [See *Parham v. Randolph*, 4 How. (Miss.) 435; *Denston v. Morris*, 2 Edw. Ch. 37; *Abbott v. Allen*, 2 John. Ch. 523; *Chesterman v. Gardner*, 5 John. Ch. 29; *Gouverneur v. Elmen-*

dorf, 5 John. Ch. 79; *Cullum v. Branch Bank*, 4 Ala. 21.]

(z) *Early v. Garrett*, 4 Man. & Ry. 687; the fact of a conveyance is not stated in 9 B. & C. 928; *Butler's n.* (1), Co. Litt. 34 a.

(a) As to representations, see *Jorden v. Money*, 5 H. L. Cas. 185; *Piggott v. Stratton*, John. 341, 29 L. J. N. S. 1.

(b) *Harding v. Nelthorpe*, *ubi sup.*

from the abstract, the purchaser, although he had obtained a regular conveyance and had not been evicted, was relieved against the purchase in equity.(c) But after the contract is executed by a conveyance and payment of the purchase money, a bill cannot be filed merely for compensation.(d)

21. Although the vendor has fraudulently concealed an incumbrance, yet the purchaser has no lien on the purchase money after it is appropriated by the vendor.(e) In the case of *Cator v. Earl of Pembroke*, *Ld. Bolingbroke* was tenant for life of a settled estate, with a power to sell and lay out money arising by sale in other lands, and in the mean time to invest the same in the funds. *Ld. Bolingbroke* granted life annuities out of the estate, and then he and the trustees of the settlement sold the estate to *Cator*, who was ignorant * of the annuities, and *Ld. B.* covenanted that *Cator* should enjoy free from incumbrances. The purchase money was invested in the funds in the names of the trustees, and *Ld. B.* granted annuities to *Boldero* to the extent of the dividends; and the trustees, at the request of *Ld. B.* gave *Boldero* an irrevocable power of attorney to receive the dividends. *Cator* being evicted by the grantee of the annuities charged on the estate, filed his bill, insisting that he had a lien on the purchase money invested in the funds, and was entitled to the dividends in exclusion of *Boldero*. The cause was first heard before the lords commissioners, who thought that *Cator* had a lien on the dividends, but that *Boldero* had a preferable equity, and therefore dismissed the bill. The cause was reheard before Lord *Thurlow*,(f) who affirmed the decree, and was moreover of opinion, that *Cator* could not follow the money when deposited with the trustees, but that having taken a covenant for quiet enjoyment and a good title, his remedy was that way.

22. But where an estate was agreed to be sold *tithe free*, and a portion of the purchase money was set apart as a security

(c) *Edwards v. M'Leay*, *Coop.* 308; aff'd by Lord *Eldon* on appeal, 11 July, 1818, with a reservation of the question as to repairs, *MS.*; 2 *Swan.* 287; *Small v. Attwood*, *You.* 416, 460; 6 *Cl. & Fin.* 232; *Lovell v. Hicks*, 2 *Yo. & Col.* 46; *Pike v. Vigers*, 2 *Dru. & Wal.* 1; *sup.*

(d) *Lenham v. May*, 13 *Price*, 749.

(e) *Cator v. Earl of Pembroke*, 1 *Bro. C. C.* 301; consider 12 *Ves.* 356, 377; *You.* 535.

(f) 2 *Bro. C. C.* 282.

against a claim to tithes of part of the estate by the parson of A., and the purchase was completed upon that footing, and the bill filed for tithes was dismissed on the ground that the lands were in the parish of B., the rector of which was entitled to the tithes; it was held that the purchaser was entitled to be indemnified out of the appropriated fund against the real claimant. It was treated as a case in which the *claim* was to be indemnified against, but the parties had mistaken the person entitled to make it.(g)

23. Where a purchaser pays part of the purchase money generally to a creditor of the vendor by security affecting the land, and also by security not affecting the land, it will be considered as a payment in satisfaction of the incumbrance which charges the estate.(h)

24. Where an equitable mortgagee under an agreement, subject to two prior mortgages, paid off the prior mortgagee, and then bought the property mortgaged, and was of course entitled to have it cleared of all incumbrances, but the purchase money was insufficient to pay all the advances; it was held, that as between him and the executors of the mortgagor, who were the sellers, he could not stand as a mortgagee and specialty creditor under the prior mortgage which he had paid off, but was bound on the day appointed for completion of the contract to pay the purchase money, in payment of what was due on the incumbrances, *according to their priorities*, although the effect of that was to leave him as a simple contract creditor for a surplus; (i) * but this was reversed in the Lords, for the sellers were of course bound to pay off the incumbrances.(k)(1)

(g) *Crompton v. Ld. Melbourne*, 5 Sim. 353.

(i) *Greenwood v. Taylor*, 14 Sim. 505; *Lacey v. Ingle*, 2 Phil. 413.

(h) *Brett v. Marsh*, 1 Ver. 468; *Hayward v. Lomax*, 1 Ver. 24; *Peters v. Anderson*, 5 Taunt. 596.

(k) *Att. Gen. v. Cox*; *Att. Gen. v. Pearce*, 3 H. L. Cas. 240.

(1) Lord Cottenham in his written judgment observed, that, upon the sale of property subject to a mortgage for its full value, it is the duty of the vendor to pay off the mortgage, is certain, if the purchaser has not the prudence to see that done, and take his title from the mortgagee; but that is not likely to arise, for what purchaser would pay the full value of property to the owner of the equity of redemption, thus leaving the mortgage a charge upon the property, and parting with the money-out of which it ought to be paid? In the judgment under appeal it is laid down as a rule of equity

25. Unless from the particular character which a man fills with relation to the estate, as agent, trustee, heir, or executor, he may enforce the whole of an incumbrance against the estate or the purchaser of it, without regard to the price at which he purchased it.^(l) Where a solicitor, being a puisne incumbrancer, advised the heir to buy a prior incumbrance as a provision for himself without disclosing the rule of equity, which would give to the incumbrancer the benefit of the purchase, he was not allowed to claim the benefit against the heir.^(m) And it was thrown out in some early cases,⁽ⁿ⁾ that as against a purchaser without notice of an incumbrance, a stranger might not be allowed more than what he really paid for it; but this is a position which it would seem to be difficult to establish.

26. If a seller is bound to relieve the estate sold from incumbrances, and the purchaser buy them up, he ought not to charge more than he paid, as that is the amount of the damage which he sustains by the breach of the covenant to pay off the incumbrances,^(o) although of course if a purchaser buy in an incumbrance to protect his estate, at an under sum, he may hold it till paid the whole charge.^(p)

27. If a seller represent to a purchaser of an estate in mortgage that part of the mortgage money is secured on some personal property, but it prove that the whole was charged on the land,

(l) *Morret v. Paske*, 2 Atk. 52; *Darcy v. Hall*, 1 Ver. 49; *Long v. Clopton*, *Ib.* 464; *Hill v. Browne*, *Dru.* 426.

(m) *Bayley v. Wilkins*, 3 J. & L. 630.

(n) *Phillips v. Vaughan*, 1 Ver. 336; *Long v. Clopton*, *Ib.* 464; *Williams v. Springfield*, *Ib.* 476.

(o) 2 Dow, 296. [See *Mayo v. Purcell*, 3 Munf. 243. So, if the vendee of lands, who has entered before the conveyance is

perfected, purchases an adverse title, he cannot set it up against the vendor, but the vendor is entitled to have it upon reimbursing the purchaser. *Morgan v. Boone*, 4 Monroe, 291, 298; *Harper v. Reno*, 1 Freem. Ch. 323, 333; *Wood v. Perry*, 1 Barb. 115, 134; *Bush v. Marshall*, 6 How. (U. S.) 284. See *Grundy v. Jackson*, 1 Litt. 13.]

(p) Ch. 23, *post*.

that upon a purchase of property subject to incumbrance for the full value, it is the duty of the vendor to apply the purchase money in payment of what is due on the incumbrances according to their priorities. If there be any such rule it can only arise upon an implied contract in the improbable case supposed of a purchaser paying the full value to the owner of the equity of redemption, trusting to his paying off the mortgage without any specific contract for that purpose, for to whom can this duty be due but to the mortgagor, who is interested in being relieved from all personal responsibilities for payment of what is due on the mortgage. It must be the subject of implied or expressed contract.

and the purchaser, after completing his purchase, is compelled to pay it off, the seller, or his personal representatives, will of course be bound to pay off the part represented to be secured on the chattels.(q)

28. A new charge has been thrown upon purchasers by the succession * duty act,(r) and which should particularly be attended to where reversionary interests are purchased. The duty is made a first charge on the property,(s) and every person in whom the property chargeable shall be vested by alienation or other derivative title at the time of the succession becoming an interest in possession, is made personally accountable to the crown for the duty to the extent of the property.(t) A purchaser of a reversion from a trustee under a will, the contract being silent as to the duty, was held liable to the duty in exoneration of the trustee. The court observed that the purchaser purchased from the trustee the right to succeed to the estate on the death of the tenant for life, which therefore carried with it the tax on the succession.(u) It is, however, provided that every receipt and certificate purporting to be a discharge of the whole duty payable for the time being in respect of any succession, or any part thereof, shall exonerate a *bonâ fide* purchaser for valuable consideration, and without notice, from such duty, notwithstanding any suppression or misstatement in the account upon the footing whereof the same may have been assessed, or any insufficiency of such assessment; and no *bonâ fide* purchaser of property for valuable consideration under a title not appearing to confer a succession shall be subject to any duty with which such property may be chargeable under the provisions of this act by reason of any extrinsic circumstances of which he shall

(q) Att. Gen. v. Cox; Att. Gen. v. Pearce, 3 H. L. Cas. 240.

(r) 16 & 17 Vict. c. 51; *In re Jenkinson*, 26 L. J. N. S. 241; *Wilcox v. Smith*, 4 Drew. 40; *In re Lovelace*, 4 De G. & J. 340; Att. Gen. v. Hallett, 2 H. & N. 368; *In re Micklethwait*, 11 Ex. 452; Att. Gen. v. Sibthorp, 3 H. & N. 424; *In re Elwes*, 3 H. & N. 719; *Harding v. Harding*, 2 Giff. 597; *Lord Braybrooke v. Att. Gen.* 9 H. L. Cas. 150; *In re Peyton*, 7 H. & N. 265; *In re Barker*, 7 H. & N. 109;

Att. Gen. v. Floyer, 7 H. & N. 238; 5 H. & N. 488; Att. Gen. v. Yelverton, 7 H. & N. 306; *In re Ramsay's Sett.* 30 Beav. 75; Att. Gen. v. Lord Lorton, 11 Ir. C. L. R. 429; Att. Gen. v. Deane, 12 Ir. C. L. R. 307.

(s) Sect. 42.

(t) Sect. 44; but powers of sale and exchange and partition may still be exercised, and the duty is charged on the substituted property, s. 42.

(u) *Cooper v. Trewby*, 28 Beav. 194.

not have had notice at the time of such purchase.(x) No purchaser, therefore, can safely complete his purchase who knows that there has been any suppression or misstatement in the account, or any insufficiency in the assessment, nor if he knows that the property ought to pay succession duty, although the title does not appear to confer a succession. These are liabilities which ought not to have been created against a purchaser: they add another obstacle to the attempt to render the transfer of property cheap and simple. The writer attempted to repeal this liability, but without success. The provision passed the Lords, but was struck out in the Commons upon the motion of the government.

29. Whatever interest the seller himself acquires in the estate subsequently to the conveyance, he will be compelled to convey to the purchaser, so as to make good the conveyance to him.(y)

(x) 16 & 17 Vict. c. 51, s. 52.

(y) *Ascough v. Johnson*, 2 Ver. 66; [*Graham v. Hatch*, 1 A. K. Marsh. 423. A conveyance to the grantor subsequent to his deed conveying to another with warranty, inures to the benefit of his grantee. *Logan v. Steel*, 4 Monroe, 433; *Mitchell v. Pettee*, 2 W. Va. 470. It is a well established rule of law, that although a deed, as a present conveyance, transfers only the title which the grantor then has, yet if it is a deed in fee with warranty, it has a further operation as a covenant real running with the land, by which the grantor and his heirs are bound to make it good, so that if the grantor has no good and sufficient title to the estate, yet if either he or they afterwards acquire a good title, it forthwith inures to the benefit of the grantee, to the same extent as if the grantor and warrantor had had the same good title at the date of the grant and warranty, to operate by way of estoppel, if the action be brought in such form that it may be pleaded by way of estoppel; otherwise, by way of rebuttal to the claim of any one bound by such warranty. *Shaw C. J.* in *Cole v. Raymond*, 9 Gray, 218; *Bates v. Norcross*, 17 Pick. 14; *Crocker v. Pierce*, 31 Maine, 177; *Brundred v.*

Walker, 1 Beasley (N. J.), 140; *Washaugh v. Entriken*, 34 Penn. St. 74; *Clark v. Slaughter*, 34 Miss. (5 Geo.) 65; *Kimball v. Schoff*, 40 N. H. 190, 196; *Morrison v. Underwood*, 20 N. H. 372; *Bell v. Twilight*, 26 N. H. 401; *Jewell v. Porter*, 31 N. H. 39; *Clark v. Baker*, 14 Cal. 612; *De Wolf v. Haydn*, 24 Ill. 525; *Ross v. Adams*, 4 Dutch. (N. J.) 160; *Bush v. Marshall*, 6 How. (U. S.) 284; *King v. Gilson*, 32 Ill. 348; *Clark v. Martin*, 49 Penn. St. 299; per *Parker C. J.* in *Somes v. Skinner*, 3 Pick. 52, 60; *Comstock v. Smith*, 13 Pick. 116; *Carver v. Astor*, 4 Peters (U. S.), 83 *et seq.*; *Jackson v. Hoffman*, 9 Cowen, 27; *Sinclair v. Jackson*, 8 Cowen, 586; *Doyle v. Peerless & Co.* 44 Barb. 239; *Fairbanks v. Williamson*, 7 Greenl. 100; *Allen v. Sayward*, 5 Greenl. 231; *Kelley v. Jenness*, 50 Maine, 455; *Jackson v. Bull*, 1 John. Cas. 81, 90; *Jackson v. Matsdorf*, 11 John. 91; *Jackson v. Stevens*, 16 John. 110, 115; 4 Kent (11th ed.), 98; *Brown v. McCormick*, 6 Watts, 60; *Logan v. Moore*, 7 Dana, 76; *Lewis v. Baird*, 3 M'Lean, 56; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528; *Bush v. Marshall*, 6 How. (U. S.) 284; *Irvine v. Irvine*, 9 Wallace (U. S.) 617; *Warburton v. Mattox*, 1 Morris,

367; *Carbrey v. Willis*, 7 Allen, 364; *Bates v. Norcross*, 17 Pick. 14; *Churchill v. Terrell*, 1 Bush (Ky.), 54; *Moore v. Rake*, 2 Dutch. (N. J.) 574; *Linsey v. Rumsey*, 22 Geo. 627; *French v. Spencer*, 21 How. (U. S.) 228; *Henderson v. Hackney*, 23 Geo. 383; *Goodson v. Beacham*, 24 Geo. 150; *O'Bannon v. Paremour*, 24 Geo. 489; *Gachenour v. Mowry*, 33 Ill. 331; *Wark v. Willard*, 13 N. H. 389. A conveyance by husband and wife, of the wife's land with covenants of warranty by both, estops the wife as well as the husband to deny her title to the land at the time of the conveyance. *Nash v. Spofford*, 10 Met. 192; see *Wadleigh v. Glines*, 6 N. H. 17; *Hill v. West*, 8 Ham. (Ohio) 222; *Bartlett v. Boyd*, 34 Vt. 256; *Wellborn v. Finley*, 7 Jones (Law), N. Car. 238; *Griffin v. Sheffield*, 38 Miss. 359. But in *Carpenter v. Schermerhorn*, 2 Barb. Ch. 314, it was held that a covenant of warranty, in a deed by husband and wife of land held in right of the wife, will not operate by way of estoppel so as to vest in the grantee in the deed an interest subsequently acquired by her. An heir and residuary devisee, who has given bond as such devisee to pay the debts of his testator is estopped to set up a subsequent title as heir of the testator's wife, against a warranty deed made by the testator of her land, although all right of action upon the covenants in that deed is barred by the statute of limitations. *Cole v. Raymond*, 9 Gray, 217. This estoppel equally extends to the heirs of the grantor and all others claiming in privity with him. 4 Kent (11th ed.), 98; *Coe v. Talcott*, 5 Day, 88; *Jackson v. Stevens*, 13 John. 316; *White v. Patten*, 24 Pick. 324; *Lawry v. Williams*, 13 Maine, 281; *Kimball v. Blaisdell*, 5 N. H. 533; *Wark v. Willard*, 13 N. H. 389; *McKendrie v. Lexington*, 4 Dana, 129; *Phelps v. Blount*, 2 Dev. 177; *Fairbanks v. Williamson*, 7 Greenl. 96. In *Fairbanks v. Williamson*, 7 Greenl. 96, it was held that a covenant in a deed of land that neither the grantor nor his heirs shall make any claim to the

land conveyed, though not technically a warranty, is a covenant real, which runs with the land and estops the grantor. And wherever the grantor is estopped, all claiming under him are estopped also. See, to the same effect, *Trull v. Eastman*, 3 Met. 121; *Bennett v. Waller*, 23 Ill. 97; *Van Rensselaer v. Kearney*, 11 How. (U. S.) 297. But the case of *Fairbanks v. Williamson*, was overruled in *Pike v. Galvin*, 29 Maine, 183, and it is opposed by a very strong current of authority. See *Harriman v. Gray*, 49 Maine, 537; *Kimball v. Blaisdell*, 5 N. H. 533; *Comstock v. Smith*, 13 Pick. 116; *Dart v. Dart*, 7 Conn. 250; *Pelletreau v. Jackson*, 11 Wend. 110; *Jackson v. Waldron*, 13 Wend. 178; *Jackson v. Wright*, 14 John. 193; *Kinsman v. Loomis*, 11 Ohio, 475. The doctrine on this point, maintained in *Pike v. Galvin*, is that where one has made a conveyance of land by deed containing no covenant of warranty, an after-acquired title will not inure or be transferred to the vendee; nor will the vendor be estopped to set up his title subsequently acquired, unless by doing so he is obliged to deny or contradict some fact alleged in his former conveyance. And in accordance with this doctrine it has been held that a covenant in a deed of land, that the grantor will warrant the land against all persons claiming under him, does not estop him from setting up a title subsequently acquired by him by purchase or otherwise. *Comstock v. Smith*, 13 Pick. 116; *Jackson v. Winslow*, 9 Cowen, 13; *Kinsman v. Loomis*, 11 Ohio, 475; *Jackson v. Hubble*, 1 Cowen, 616; see *Doswell v. Buchanan*, 3 Leigh, 365; 4 Kent (11th ed.), 98, 99. So a covenant of lawful seisin in fee and good right in the grantor to convey, does not estop him from setting up an after-acquired title in himself, against the grantee; *Allen v. Sayward*, 5 Greenl. 227; nor does a quitclaim deed; *Robertson v. Wilson*, 38 N. H. 48; *San Francisco v. Lawton*, 18 Cal. 465; *Gibson v. Chouteau*, 3 Missou. 536; *Cadiz v. Majors*, 33 Cal. 288. It was held in

Crocker *v.* Pierce, 31 Maine, 177, that a creditor acquires no title by an attachment, followed by a levy, upon land, to which at the time of the attachment the debtor had no title, but of which he had given a warranty deed to a third person, though he, the debtor, after the attachment and before the levy, obtained the title; the warranty deed having been recorded prior to the levy, though not prior to the attachment. But see Fairbanks *v.* Williamson, 7 Greenl. 96; Varnum *v.* Abbot, 12 Mass. 474. If the estate, that comes to the grantor, is to him as trustee to convey to a *bonâ fide* purchaser, the estoppel does not apply. Burchard *v.* Hubbard, 11 Ohio, 316. Nor does it apply so as to aid a purchaser of an equitable title at a sheriff's sale. Pratt *v.* Phillips, 1 Sneed (Tenn.), 543. But where a woman on the eve of marriage made a conveyance of an estate to which at the time she

had no title, but to which she afterwards acquired a title, it was decided that the title subsequently acquired passed to the trustee by estoppel. Benick *v.* Bowman, 3 Jones Eq. (N. Car.) 314. A deed of land by an agent in the name of his principal, passes his own title, as it estops him to deny his principal's title; Harney *v.* Morton, 36 Miss. (7 Geo.) 411. See Kern *v.* Chalfant, 7 Minn. 487; Lee *v.* Getty, 26 Ill. 76. As to deeds of warranty of a contingent remainder in real estate, see Hayes *v.* Tabor, 41 N. H. 521; Robertson *v.* Wilson, 38 N. H. 48; 4 Kent (11th ed.), 98. It is held in Calder *v.* Chapman, 52 Penn. St. 359, that the principle that a purchase of land by one who has previously without title conveyed the same, inures to the benefit of the prior grantee, can only apply to prevent fraud; and cannot affect a *bonâ fide* purchaser of the grantor without notice.]

* CHAPTER XIV.

OF THE CONVEYANCE AND COVENANTS FOR TITLE.

SECTION I.

OF THE CONVEYANCE.

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| 1. Expense where incumbrancers join thrown on seller. | 21. Conveyance to lessee determines covenants in lease. |
| 2. Parties agreed upon, must join although not necessary. | 22. Expense of conveyance falls on purchaser: of execution on seller. |
| 3. Form of conveyance. — Recital. | 23. Purchaser pays for surrender and admittance: expenses under trustee act. |
| 4. Legal estate in trustee or mortgagee. | 24. Bargain and sale under power to sell copyhold. |
| 5. Quantities of parcels. | 25. Sale in lots where vesting order required. |
| 6. Grant of deeds. | 26. Seller to convey or surrender not by attorney. |
| 7. Covenants. | 27. Seller not bound to appoint attorney. |
| 8. Disentailing deed, when to be executed. | 28. Expenses of reinvesting price of a settled estate. |
| 9. Legal estate in persons under disability. | 29. Draft belongs to purchaser. |
| 10. Conveyances by married women. | 30. So deed imperfectly executed. |
| 11. Charges by seller after contract to sell. | 31. Or deed executed by seller where contract is rescinded, as parchments. |
| 12. Notice of incumbrance after payment and before conveyance. | 32. But it may be cancelled. — Purchaser's lien on deeds. — Seller's attorney has no lien on conveyance. |
| 13. Statement of objection to title. | 33. Seller no lien at law after absolute conveyance. |
| 14. Mistake in conveyance corrected. | 34. Conveyance should be registered. |
| 15. Alteration in draft should be communicated. | 35. Short statute conveyance. |
| 16. When conveyance may be prepared. | 36. Execution of conveyance. — Payment of purchase money. |
| 17. Discovery of defect before engrossment. | |
| 18. Eviction before execution. | |
| 19. Preparation of conveyance relying upon a promise by seller. | |
| 20. Bad title, no conveyance need be prepared. | |

1. THE strict rule seems to be that the vendor must procure the fee to be vested either in himself, or a trustee for him ; (*a*¹) and that a purchaser is not compellable to bear the expense of a long conveyance, on account of the legal estate having been

(*a*¹) [See *Dresel v. Jordan*, 104 Mass. 407.]

outstanding for a length of time, or of the estate being subject to incumbrances which are to be paid off. (a) It is not, however, usual to insist upon this, unless the title cannot be perfected without a private act of parliament; in which case, the expense of obtaining it is always borne * by the vendor. But where the length of the conveyance is increased by the junction of incumbrancers, it is not unusual to require the seller to pay the extra expense. In a case (b) where a man agreed to demise to another at a peppercorn for a sum in gross; being in effect a sale, and the seller could not make a valid lease without the concurrence of a person entitled to an equity of redemption in the property, it was held that the seller had a right to refuse to procure a release by a separate deed, and that he might insist upon the incumbrancer being made a party to the deed to the purchaser, he (the seller) paying the extra expense occasioned by that person's concurrence in the deed. The court observed, that the agreement was so expressed that the lessee (or purchaser) had great reason to consider that the demise was to be made by the other party alone, and consequently that the expense of the demise which he agreed to bear, was the expense of a demise to be executed by the other party alone. The agreement was the compromise of an action of ejectment, and was in general terms, and was silent as to expenses. The true rule seems to be that the extra expenses in such cases are to be borne by the seller, unless the contract shows that the purchaser was buying an incumbered estate. Where a corporation was bound to pay the costs, charges, and expenses of the reinvestment of purchase moneys in other estates, the purchasers' counsel advised that the vendors of estates purchased should take releases of incumbrances by separate deeds, which was done; and it was held that the costs of the purchasers' solicitor in perusing the drafts, and of the counsel for approval, could not be charged against the corporation. (c) A condition that a purchaser shall, if he require a conveyance of any outstanding term, pay the expenses attending the getting in and conveyance of the term, including inquiries, does not extend to a mortgage term on foot at the

(a) 1 H. Black. 280.

(b) *Reeves v. Gill*, 1 Beav. 375.(c) *Jones v. Lewis*, 1 De G. & Sm. 245; *inf.* pl. 28.

time of the sale, although money had been carried over before the sale by order of the court to satisfy the mortgage.(d)

2. Where the contract provides that certain persons shall be parties to the conveyance, the court will not enter into the question whether or not they are necessary parties.(e)

3. The form of the conveyance is too well known to require any observation in this place, but even the common recital that the seller is seised in fee may be useful, as it would prevent the seller from indirectly setting up as against the purchaser any preceding estate which he himself had created.(f) But unless it can be clearly collected * from the deed that the parties to it have agreed upon a certain admitted state of facts as the basis on which they contract, it seems impossible to maintain that any recital of the vendor's title can bind *the purchaser* by estoppel.(g) If such were the law, a purchaser would be advised to reject all recitals in his conveyance, beyond that of the mere contract.

4. Where the legal estate is outstanding in a trustee, and the estate is sold in lots, it may be advisable to take a conveyance from him by separate deed in the first instance; it would save expense, for the trustee may require recitals in a transfer from him which could not be required by a purchaser;(h) and besides, a trustee may refuse to convey by parcels, and require to be divested at once of the whole of the estate. And he may refuse to convey by a new description. These observations apply to some extent to a mortgagee also.(i) The purchaser may divide the purchase money, and prepare conveyances of the property by separate deeds,(k) but this, no doubt, would not be allowed to an extent which would much increase the vendor's expenses.

5. If the purchaser bought by the acre, and is entitled to the quantity stated, he should not allow the words "more or less," or "by estimation," or the like, to be added in the conveyance to

(d) *Stronge v. Hawkes*, 2 Jur. N. S. 388; see 4 De G., M. & G. 186.

(e) *Benson v. Lamb*, 9 Beav. 502.

(f) *Sup.*; *Doe v. Stone*, 3 C. B. 176; *Bensley v. Burdon*, 2 Sim. & Stu. 519; *Right v. Bucknell*, 2 B. & Ad. 278, *inf. n.*

(g) Consider *Young v. Raincock*, 7 C. B. 310. [See *Rossee v. Wickham*, 36 Barb. 386; *Briggs v. Seymour*, 17 Wis. 255; *Allen v. Allen*, 45 Penn. St. 468;

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Graham v. Meek, 1 Oregon, 325; *Jefferson v. Howell*, 1 Houston (Del.), 178; *Hays v. Askew*, 5 Jones Law (N. Car.), 63; *Clamorgan v. Greene*, 32 Mis. 285; *Hempstead v. Easton*, 33 Mis. 142; *Thompson v. Morgan*, 6 Minn. 292.]

(h) *Holford v. Phipps*, 3 Beav. 434.

(i) *Goodson v. Ellison*, 3 Rus. 593, 594.

(k) *Clark v. May*, 16 Beav. 273.

the quantities. *(l)* But, of course, any doubt about quantity should be cleared up before the conveyance is prepared.

6. It is advisable in the present state of the law to add, in a few words, a grant of the deeds where the purchaser is entitled to the custody of them. *(m)*

7. We shall presently consider fully the covenants to which a purchaser is entitled, *(n)* and the construction of covenants for title. *(o)*

8. We have already seen that a seller being tenant in tail is not bound to execute a disentailing deed until he is about to complete the purchase by conveyance. Of course, the expense attending the bar under the statute cannot be thrown on the purchaser.

9. The new trustee act enables a title to be made where the estate is in a lunatic or an infant, or in an heir who cannot be traced or found, or in a person who is out of the jurisdiction, or where the trustee has left no heir, provided he is, or would if living be a trustee within the provisions of the statute, and in other like cases, the enactments of which statute have already been sufficiently set forth; and as we have seen, extensive powers are given to enable *a conveyance to be obtained of an outstanding estate in a mortgagee. *(p)*

10. We have before pointed out the power of a married woman under the 3 & 4 W. 4, c. 74, to concur in barring her estate tail by deed duly acknowledged and enrolled, and also her power to convey her estate generally by deed duly acknowledged; *(q)* and in cases provided for she may be permitted by the common pleas to convey without her husband's concurrence, and this extends to her copyholds; *(r)* she can also disclaim by deed duly acknowledged, or release all her contingent interests of every description. *(s)* It may be useful to observe that some late

(l) *Sup*; [4 Kent (11th ed.), 466, 467; Roat v. Puff, 3 Barb. 353; *ante*, 324, notes.] *(q)* Ch. 12, *sup*.; s. 77, 78, 79, 80, 90, of the 3 & 4 W. 4, c. 74.

(m) *Sup*. ch. 11, s. 4.

(n) *Inf*. s. 3.

(o) *Inf*. c. 15.

(p) *Sup*. p. 202; 13 & 14 Vict. c. 60; 15 & 16 Vict. c. 55; Sugd. Stat. (2d edit.) ch. 9, p. 410. *(r)* S. 91; *Ex parte Shirley*, 5 Bing. N. C. 226; where property is sold under a compulsory provision by statute, see *In re Foster*, 7 C. B. 120. *(s)* 8 & 9 Vict. c. 106, s. 6, 7; see 7 & 8 Vict. c. 76, s. 5.

cases have, contrary to previous authority and the general opinion of the profession, held that a wife is entitled to a settlement out of her equitable interest in a real estate, which doctrine has been carried to an extent that it may be found difficult to support. The decision of the vice chancellor in *Sturgis v. Champneys*, which Lord Cottenham reversed, was, I apprehend, a true exposition of the law.(t) A purchaser, however, must act upon the law as laid down by the late cases in purchasing equitable estates to which the seller is entitled in his marital right.

11. As the seller's interest may be charged by judgments or by conveyance or assignment after the contract and before the conveyance, the purchaser should keep this in view; but although a seller may of course assign the purchase money unpaid to another with the benefit of his lien, yet the assignee, although a *bonâ fide* purchaser of the money, will take subject to the rights of the purchaser of the estate to have the estate cleared of incumbrances; and the assignee cannot better his condition by paying off a mortgage, for it is not a case for tacking.(u)

12. If the purchaser receive notice of any incumbrance or adverse title before the conveyance is executed, although the money is paid, he would be bound by it, and therefore he should withhold the deed, and require the vendor to clear the estate before it is conveyed.(x)

13. If a person concur in a conveyance in order to remove an objection to the title, the objection should be so stated as to convey full information to the party concurring.(y)

14. Although the purchaser's attorney prepare the conveyance, yet * if by mistake he draw it contrary to the written agreement, it will be corrected in favor of his client the purchaser.(z)

15. If a draft of a conveyance be altered by either party, although the alteration be such as would be supported by the court, yet the draft, as altered, should not be engrossed without a communication being first made to the other party.(a)

16. The conveyance should not be prepared before the pur-

(t) *Sturgis v. Champneys*, 5 My. & Cra. 97; *Hanson v. Keating*, 4 Hare, 1; *Wortham v. Pemberton*, 1 De G. & Sm. 644, which carried the doctrine still further, and *qu.*

(u) *Lacey v. Ingle*, 2 Phil. 413.

(x) *Inf.* ch. 24.

(y) *Ld. Braybrooke v. Inskip*, 8 Ves. 417; *post*, ch. 23.

(z) *Rob v. Butterwick*, 2 Price, 190.

(a) *Staines v. Morris*, 1 Ves. & Bea. 15.

chaser is satisfied with the title, and has inspected the title deeds; for if the purchase were to go off, because, for example, the deeds could not be produced, the purchaser would not be able to recover the expense of the conveyance; nor is it material that the seller has adopted the conveyance and actually executed it; (b) but if any of the parties refuse to execute the conveyance, and the contract is rescinded, the purchaser may recover the expenses as part of the damages.(c)

17. And if a defect of title is discovered after the conveyance is engrossed, the court will inquire into the validity of the objection.(d)

18. We have already seen in what cases an eviction, before the conveyance is executed by all parties, enables a purchaser to recover his purchase money, if he have paid it.(e)

19. We have also seen that if a purchaser prepare and engross his conveyance, which is executed, yet he will not be bound to proceed, if he relied upon a previous promise by the seller to produce, if required, the deeds which were in the custody of a third person, and the seller fail to produce them.(f)

20. Where a bad title is produced, or the vendor has resold the estate, the purchaser may maintain an action for his deposit, or for damages, without preparing a conveyance.(g)

21. If a lessee is the purchaser, the conveyance, we have seen, puts an end to the covenants in the lease.(h)

22. Unless there be an express stipulation to the contrary, the expense of the conveyance falls on the purchaser; (i) who must prepare and tender the conveyance.(k) The expense attending the *execution* of the conveyance is, however, always borne by the vendor, who is bound to procure the execution of the conveyance by all necessary parties, and if any of them refuse to execute, the contract may be considered as rescinded.(l) But of course the vendor does not pay the costs of the purchaser's attorney, where the purchase is completed.

(b) *Jarman v. Egelstone*, 5 C. & P. 172; *sup.*, and *qu.* Knight *v.* Crockford, 1 Esp. 189; *Wilmot v. Wilkinson*, 6 B. & C. 506; *sup.*

(c) 3 B. & C. 231.

(h) 1 Bligh, 69.

(d) *Const v. Barr*, 2 Mer. 57; the order by consent.

(i) 2 Ves. jr. 155; this is the universal practice of the profession.

(e) *Sup.* c. 13, s. 2,

(k) *Sup.* [*Ante*, 241, notes.]

(f) *Jarman v. Egelstone*, 5 C. & P. 172.

(l) 3 B. & C. 229.

(g) *Seward v. Willock*, 5 East, 198;

* 23. If the estate be copyhold, the purchaser must bear the expense both of the surrender to him and of his admission; (*m*) and a vendor is not obliged to pay the fine due on the *admission* of the vendee, although he covenant to surrender and assure the copyholds at his own costs and charges; (*n*) because, it is said, the title is perfected by the admittance, and the fine is not due till after. (*o*) But, although it is stipulated that the costs of the surrender are to be borne by the purchaser, yet if it turn out that the heir of a trustee is unknown, the expenses of the petition, &c., under the trustee act, must be borne by the seller. (*p*) (1) Neither does a condition that the purchaser shall have proper surrenders, &c., at his own expense, on payment of his purchase money, cast on him the expense of the fine, &c., on admission of the heir of a trustee who dies after the sale, but before the surrender, for it does not make him liable to the expense of procuring the concurrence of proper parties. If the expense were occasioned by his delay, that would be a different ground. (*q*)

24. Where by will a power to sell a copyhold is given, (*r*) or where by surrender accepted by the lord, (*s*) or authorized by custom, for without a custom he may reject the surrender, (*t*) a like power is given, the purchaser can only require the seller to execute a bargain and sale to him, which will entitle him to admittance; and if he require the seller to be admitted, and, pending the delay occasioned by his demand, the lord seise *quousque* and bring an ejectment, yet the purchaser will be compelled to complete upon the simple execution of a bargain and

(*m*) *Drury v. Man*, 1 Atk. 95, Sand. edit.

(*n*) *Graham v. Sime*, 1 East, 632.

(*o*) *Dalton v. Hammond*, 4 Co. 28 *a*; *Rex v. Lord of Manor of Hendon*, 2 T. R. 484; *Fishe v. Rogers*, 1 Ro. Ab. 506 (A.), pl. 1; 3 Bur. 1543; *Lex Cust.* 163; *Wood Inst.* 137; *Gilb. Ten.* 205; 1 Watk. Copy. 286; *sed qu.* *Dalton v. Hammond*, Cro. Eliz. 779; Mo. 622, pl. 851; *supp.* to Co. Copy. s. 10; *Parkins v. Titus*, MS.

(*p*) *Bradley v. Munton*, 16 Beav. 294.

(*q*) *Paramore v. Greenslade*, 1 Sm. & Gif. 541.

(*r*) *Glass v. Richardson*, 9 Hare, 698; 17 Jur. 916.

(*s*) *Rex v. Lord of Manor of Oundle*, 3 Nev. & Man. 484.

(*t*) *Flack v. Downing*, Coll. 13 C. B. 945.

(1) Where the trusts are by custom or permission entered on the rolls, there appears to be an unnecessary difficulty raised in afterwards omitting any reference to the trusts. *The Queen v. Lord of Manor of Houghton*, 24 L. T. 14, Q. B.

sale, and must bear the consequences of the lord's proceedings.(u)

25. If the estate is in an infant, and is to be obtained by a vesting order, a purchaser of one of several lots may apply for such an order, and the expense must be borne by the estate.(x) This should be guarded against upon a sale.

* 26. A purchaser has a right to require the vendor himself to surrender the estate, if copyhold, and to execute the conveyance, if freehold; and he cannot be compelled to accept either a surrender or conveyance, under a power of attorney, unless an actual necessity appears for it.(y) A power of attorney given for a valuable consideration cannot, however, be revoked.(z) But the vendor may be dead at the time the power is exercised.(a) Where, therefore, a purchaser permits the conveyance to be executed by attorney, the attorney should execute a declaration of trust, that he will stand possessed of the purchase money in trust for the purchaser, until it either appear by satisfactory evidence that the vendor was alive at the time of the

(u) *Glass v. Richardson*, *ubi sup.*; see the singular case of *The Queen v. Corbett*, 1 El. & Bl. 836.

(x) *Ayles v. Cox*, 17 Beav. 584.

(y) *Mitchel v. Neale*, 2 Ves. 679; *Richards v. Barton*, 1 Esp. 268; *Id.* 115; *Noel v. Weston*, 6 Madd. 50; *Johnson v. Mason*, 1 Esp. 89; *Eaton v. Sanxter*, 6 Sim. 519; *Duke of Beaufort v. Glynn*, 3 Sm. & Gif. 213, 1 Jur. N. S. 888. [A letter of attorney, by force of which a deed of real estate is executed, is not required by law to be acknowledged and recorded in Massachusetts. *Valentine v. Piper*, 22 Pick. 85; see in New York, *Wilson v. Troup*, 2 Cowen, 195; see *ante*, 727, notes.]

(z) *Walsh v. Whitcomb*, 2 Esp. 565; *Smart v. Sanders*, 5 C. B. 916. [A power coupled with an interest cannot be revoked, *Knapp v. Alvord*, 10 Paige, 205; *Hunt v. Rousmanier*, 8 Wheat. 174; S. C. 2 Mason, 244, 250; *Bergen v. Bennett*, 1 Caines Cas. 15; *Wilson v. Troup*, 2 Cowen, 195; *Davis v. Lane*, 10 N. H. 156; *Smyth v. Craig*, 3 Watts & S. 14;

Cassidy v. McKenzie, 4 Watts & S. 282; *Chitty Contr.* (10th Am. ed.) 225, 226; *Fabens v. Mercantile Bank*, 23 Pick. 330; *Brown v. McGran*, 14 Peters (U. S.), 479, 495; *Houghtaling v. Marrin*, 7 Barb. 412; *Mansfield v. Mansfield*, 6 Conn. 559; *Wheeler v. Wheeler*, 9 Cowen, 34.]

(a) *Shipman v. Thompson*, *Wynne v. Thomas*, Willes 105, 565; *Wallace v. Cooke*, 5 Esp. 117; *Bailey v. Collett*, 18 Beav. 179; *Webb v. Kirby*, 3 Sm. & Gif. 333, 7 De G., M. & G. 376. [See *Chitty Contr.* (10th Am. ed.) 226, note (p), and cases in next note above; *Galt v. Galloway*, 4 Peters (U. S.) 332; *Jenkins v. Atkins*, 1 Humph. 294; *Rigs v. Cage*, 2 Humph. 350; *Stirnermaun v. Cowing*, 7 John. Ch. 275, 285; *Gale v. Tappan*, 12 N. H. 146; *Gleason v. Dodd*, 4 Met. 333, 341; *Huston v. Cantril*, 11 Leigh, 137; *Harper v. Little*, 2 Greenl. 14, 18. Insanity has been held to terminate an agency, but not to the injury of a third person who has trusted to an apparent authority in ignorance of the principal's incapacity. *Davis v. Lane*, 10 N. H. 156, 159.]

execution of the deed, or if he shall be dead, until the estate is duly conveyed to the purchaser.^(a¹) It is usual to deliver the conveyance to the seller's solicitor in order that he may procure it to be executed by him, but strictly the purchaser has a right to have the execution of the conveyance attested by a witness of his own unless there are special circumstances justifying the refusal.^(b) The rule is not universal.

27. On the other hand, if a vendor only covenant to surrender or convey lands to a purchaser upon request, he is not compellable to appoint an attorney for that purpose.^(c)

28. The expense of reinvesting the purchase money of a settled estate in another estate will not fall upon the purchaser of the settled estate, although he has agreed to pay, after enumerating particular expenses, all other expenses whatsoever of the seller's in consequence of the sale, or arising out of, or in any wise relating thereto.^(d)

29. The draft of the conveyance is usually left with the attorney, which has been called an act of negligence. The draft is the client's property.^(e)

30. If a purchase were to go off after the delivery of the conveyance by the purchaser for execution by the seller, the purchaser, if the deed were not executed, or only executed by immaterial parties, would be able to maintain trover for it as a piece of stamped parchment.

* 31. And even where ^(f) the conveyance had been executed by the sellers, and remained in the custody of an attorney of theirs, to whom it was delivered by a servant of the sellers, who

(a¹) [As to the mode in which an agent or attorney should execute a deed, see *ante*, 57, note. In *Beard v. Kirk*, 11 N. H. 397, it was held that in a case where an agency constituted by writing is revoked, but the written authority is left in the hands of the agent, and he subsequently exhibits it to a third person, who deals with him as agent on the faith of it without any notice of the revocation, the act of the agent within the scope of the authority will bind the principal. See, also, *Morgan v. Stell*, 5 Binn. 305; *Hancock v.*

Byrne, 5 Dana, 513, 515; *Bowerbank v. Morris*, Wallace C. C. 119.]

(b) *Viney v. Chaplin*, 4 Drew. 237; 2 De G. & J. 468; see 22 & 23 Vict. c. 35, s. 26, for the security of trustees, where the principal is dead.

(c) *Symms v. Lady Smith*, Cro. Car. 299; God. 445.

(d) *In re London Bridge Acts*, 13 Sim. 180; *sup.* pl. 1; *sup.* c. 2.

(e) *Doe v. Seaton*, 2 Ad. & El. 178; *Ex parte Horsfall*, 7 B. & C. 528.

(f) *Esdaile v. Oxenham*, 3 B. & C. 225.

had given it to the servant in order that it might be sent back, but there were still two other parties to execute, who refused to do so, and the purchaser gave up the contract and received back part of the money which he had paid in respect of the purchase, he was held entitled to recover the deed from the attorney as a piece of stamped parchment, by two judges against one. They did not decide that the deed might not be cancelled, but the purchaser they thought was at all events entitled to have the deed restored to him in a cancelled state.

32. Of course a purchaser, who has delivered his conveyance to the seller to be executed by him, so far qualifies his right of property in the deed, that if it be executed, the seller has a right to retain it until the purchase money is paid or tendered, for the stamped parchment becomes, by its execution, a deed, and as such, would vest the estate in the purchaser, and the possession of the deed would enable him to recover the estate. The decision in *Esdale v. Oxenham* depended upon the instrument having been imperfectly executed, and upon the sellers not interposing to claim any interest in it; and the contract having been rescinded, what might have been a deed was treated as a spoiled parchment. The court in this view, it appears, made an order in substance, that the deed should be delivered to the purchaser, giving to the sellers the right to cancel it; but, cancelled or uncanceled, it was to be delivered to the purchaser.^(g) The attorney claimed a lien on this deed for money due to him as such attorney, and upon a bill filed by him to establish his lien in equity, the decision at law was adopted; and as it appeared that the purchaser had not been repaid the whole of the money he had paid, and claimed a lien for the residue, and had the other deeds in his possession, the court, without saying whether the deeds passed the legal estate or not, said, that if they did they ought to belong to the purchaser, and go with the other deeds.^(h) The principle of a vendor's lien, which the attorney claimed through the vendor, had no application, as the contract had gone off by the default of the vendor. This case decides, that if a conveyance prepared by a purchaser finds its way into the hands of the seller's attorney after the execution of it by the

(g) See 3 Yo. & Jer. 263.

(h) *Oxenham v. Esdale*, 2 Yo. & Jer. 493, 3 Yo. & Jer. 262.

seller, the attorney cannot claim a lien on the deed for money due to him as such attorney; (*i*) nor can the purchaser's solicitor claim a lien on the deeds delivered to him, for his general costs, or * for his costs of preparing the conveyance, against a prior mortgage by the purchaser, although he (the solicitor) had no notice of it. (*j*)

33. If a seller convey the estate to a purchaser absolutely and completely, although the money be not paid, he is not entitled to any lien at law, but on the contrary, the purchaser may recover the title deeds remaining in the seller's possession. (*k*)

34. Where the estate lies in a register county, the conveyance should be registered as soon as it is executed; (*l*) and of course that duty devolves on the purchaser for his own security. (*m*)

35. A late statute enables a party, if he chooses, to convey in a short form, and with covenants simply expressing the operation of the forms usually adopted; and gives to such a conveyance the same operation as if it were framed in the usual terms. (*n*)

36. A prudent vendor will not execute the conveyance until the purchase is about to be completed and the money paid to him. A purchaser cannot safely pay the purchase money to the vendor's attorney without the seller's authority, although he is intrusted with the conveyance and is ready to deliver it up. (*o*)

(*i*) *Esdaile v. Oxenham*, 3 B. & C. 225; *Oxenham v. Esdaile*, 2 Yo. & Jer. 493, 3 Yo. & Jer. 262.

(*j*) *Pelby v. Wathen*, 7 Hare, 351; 1 De G., M. & G. 16.

(*k*) *Goode v. Burton*, 1 Ex. 189.

(*l*) *Hilliard*, n. 2, *Shep. Touch.* 116. [In some of the States of the Union the statutes have prescribed a time within which deeds and mortgages shall be registered; if registered within that time, it is enacted in some, and understood in others that they take effect from the time of their execution and delivery. 2 Cruise Dig. by Mr. Greenleaf, vol. 4, tit. 32, Deed, ch. 19,

note (1); *post*, 727, notes. But in those States where no time is fixed for registration of deeds, they must be recorded immediately, and no effect is given to registration anterior to the time when the deeds are actually entered for record. *Post*, 727, notes.]

(*m*) *Mittelholzer v. Fullarton*, 6 Ad. & Ell. N. S. 989.

(*n*) 8 & 9 Vict. c. 119; as to leases, 8 & 9 Vict. c. 124.

(*o*) *Sup.* p. 48; *Wilkinson v. Candlish*, 5 Ex. 91; *Kent v. Thomas*, 1 H. & N. 473; see *Lucas v. Wilkinson*, *Ib.* 420.

SECTION II.

OF STAMPS.

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| <ol style="list-style-type: none"> 1. Instruments may be stamped, so as to exclude doubt. — Unstamped or improperly, on payment of penalty. 2. Payment of duty and penalty in court: evidence. 3. The <i>ad valorem</i> duty on conveyances on sales. 4. How to be paid: 1. Where several purchasers and property conveyed in parts by one or several deeds. — 2. Where the conveyance is immediate to a subpurchaser. — 3. Or to several subpurchasers. — 5. Conveyance by purchaser to subpurchaser, and the conveyance by the original seller to the subpurchaser. — 6. Where several sellers of distinct properties convey to a purchaser by one deed. — 7. Where the consideration is a mortgage or other debt. 5. Duty payable on mortgage money, though purchaser not liable to it. 6. Duty attaches on timber, fixtures, &c. 7. Annuities, the consideration duty attaches. 8. Where improper stamps are valid. 9. What is the principal deed. | <ol style="list-style-type: none"> 10. Agreements not to be stamped as conveyances. 11. False statement of consideration does not avoid the deed. 12. Price may be reduced to save duty. 13. Apportionment of consideration. 14. One set of stamps only to conveyance. 15. Unless other estates or matter not incident. 17. Junction of third person to enter into covenant requires no further stamp. 18. Indorsements, &c., to be counted. 19. Inventory also. * 20. Attornment requires no stamp. 21. <i>Ad valorem</i> duty sufficient, though less than 1<i>l.</i> 15<i>s.</i> 22. Conveyance with mortgage requires two stamps. 23. Award under inclosure does not require <i>ad valorem</i> stamp: assignment by sheriff does. 24. Whilst execution <i>in fieri</i>, alterations and re-executions valid without new stamps. 25. Progressive duty, where not payable. 26. Receipt stamp: contract stamp. 27. Seller to obtain proper stamp to an agreement for lease. |
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1. THE stamp act of 1850 for the first time enabled parties to have their deeds stamped whether previously stamped or not, so as to be absolutely valid as far as regards the stamps. This was a great boon.(a) A fee of 10*s.* is to be paid at all events, and any penalty, if not duly stamped, besides the proper duty.(a¹) So that if any doubt arise as to the proper stamp to be imposed on a deed it can be set at rest by the payment of 10*s.*, and an appeal lies from the commissioners to the court of exchequer. Agreements and deeds may be properly stamped where they

(a) 13 & 14 Vict. c. 97, s. 14, 15; Morgan v. Pike, 14 C. B. 473; 16 & 17 Vict. c. 59, s. 13.

(a¹) [The penalty, under the United States internal revenue act of July 14, 1870, c. 255 § 5, for making, signing, or is-

suing instruments without being stamped according to the requirements of the stamp act, is "double the amount of tax remaining unpaid, but in no case less than five dollars."]

have been executed without any or with improper stamps,(b) upon payment of a penalty, which may be remitted within twelve months after their execution.(c) But if the instrument be lost, the want of proper stamps cannot be supplied.(d) The commissioners, where application is made to them in regard to the stamps, are authorized to require evidence by affidavit of the quantity of words in the deed, and whether or not the consideration, &c., are truly set forth, and they may refuse to act, except on payment of the duty, which would be chargeable if such matters had been truly set forth.(e)

2. Upon the production of any document as evidence at the trial of any cause, the officer of the court is to call the attention of the judge to any omission or insufficiency of the stamp, and the document cannot be received in evidence until the deficiency of duty and the penalty, and 1*l.* additional penalty, shall have been paid to the officer of the court.(f) But no new trial is to be

(b) *Rex v. Inhab. of Preston*, 5 B. & Ad. 1028. [See *Holyoke Machine Company v. Franklin Paper Company*, 97 Mass. 150; *Tobey v. Chipman*, 13 Allen, 123.]

(c) 13 & 14 Vict. c. 97, s. 12, 13. [Under the act of Congress passed June 30, 1864, ch. 173, § 163, any instrument before that time signed or issued without being duly stamped, or with an insufficient stamp, may have the required stamp affixed in the presence of the court where in it is proposed to use it, and thereby be made valid. The internal revenue act, passed March 3, 1865, ch. 78, which took effect on the 1st of April, 1865, left § 163 of the act of 1864 as it originally stood, but provided in § 1, that where a party had not affixed the proper stamp to any instrument as required by the act of June 30, 1864, and wished to do so, he might appear before the collector of the district, and on payment to him of the price of the proper stamp, and the penalty imposed unless he should satisfy the collector that he had no design to defraud the United States of the duty, such collector should affix the proper stamp, and the instrument should thereupon be deemed valid. In this state of the law, it was held in *Garland v.*

Lane, 46 N. H. 245, that the provisions made by the act of June 30, 1864, c. 173, § 163, for stamping, in the presence of the court where it is to be used, any instrument before that law signed or issued without being stamped, were not repealed or affected by the law of March 3, 1865, which applies to instruments requiring stamps *under* the law of June 30, 1864. But the internal revenue act of July 13, 1866, c. 184, § 9, which took effect on the 1st of September, 1866, amended § 163 of the act of June, 1864, by striking out all after the enacting clause, and omitting to reenact the clause, authorizing instruments to be stamped in the presence of the court. See *Green v. Holway*, 101 Mass. 243, 247. So that if the above decision is correct, this would seem to leave no remedial provision for cases where there has been a failure to affix the proper stamp to instruments signed or issued previously to June 30, 1864.]

(d) *Rappener v. Wright*, 2 B. & Ald. 478. [Under the United States internal revenue act of July 13, 1866, c. 184, § 9, the proper stamp may be affixed to a copy, where the original instrument is lost.]

(e) 17 & 18 Vict. c. 83, s. 17, 18.

(f) 17 & 18 Vict. c. 125, s. 28, 29;

granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp.^(g)

3. The *ad valorem* duty is imposed upon every description of conveyance *upon the sale* of any lands, tenements, rents, annuities, or other property, real or personal: it commences with only a half crown duty where the purchase money does not exceed 25*l.*, and increases progressively until the purchase money exceeds 550*l.*, and does not exceed 600*l.*, when the duty is 3*l.*; and where the purchase * money exceeds 600*l.*, then for every 100*l.*, and for any fractional part of 100*l.*, the duty is 10*s.*^(g¹) And

Browne v. Savage, 5 Jur. N. S. 1020. [By the internal revenue act of 1866, which took effect on the 1st of September, 1866, it was provided that no instrument, document, writing or paper, signed or issued without being duly stamped, should be "recorded, or admitted or used in evidence in any court, until a legal stamp or stamps denoting the amount of tax shall have been affixed thereto as prescribed by law;" United States St. 1866, c. 184, § 9. It was decided after full consideration, in *Carpenter v. Snelling*, 97 Mass. 452, that this enactment must be limited to the courts of the United States, and not be construed to extend to, if indeed it could constitutionally bind, the state courts. So held also in *Green v. Holway*, 101 Mass. 243. This decision is in accordance with the adjudications in many other cases involving the same point. See *Griffin v. Ranney*, 35 Conn. 239; *Craig v. Dimock*, 47 Ill. 308; *Bunker v. Green*, 48 Ill. 243; *McGovern v. Hoesback*, 53 Penn. St. 177; *Hitchcock v. Sawyer*, 39 Vt. 412; *Lynch v. Morse*, 97 Mass. 458; *Clemens v. Conrad*, 19 Mich. 170; *Green v. Holway*, 101 Mass. 243; *Latham v. Smith*, 45 Ill. 29; *People v. Gates*, 43 N. Y. 40. But in other cases the contrary construction has been given to substantially the same provision enacted by act of June 30, 1864, c. 173, § 163. See the city of *Muscatine v. Sterneman*, 30 Iowa, 526, 528, 529, and many other cases, decided in the State of Iowa, there referred to; *Plessinger v. De-*

puy, 25 Ind. 419; *Howe v. Carpenter*, 53 Barb. 382; *Cole v. Bell*, 48 Barb. 194; *Myers v. Smith*, 48 Barb. 614; *Hoppock v. Stone*, 49 Barb. 524; *Morris c. McMorris*, 44 Miss. 441.]

(g) 17 & 18 Vict. c. 125, s. 31.

(g¹) [Under the United States internal revenue acts, the stamp duty on conveyances of real estate is fifty cents for every five hundred dollars, and for any fractional part thereof. June 30, 1864, c. 173, § 170, Sch. B. Mortgages of real estate; and conveyances of real estate in trust to be sold or otherwise converted into money, which shall be intended only as security, and shall be redeemable before the sale or other disposal thereof, either by express stipulation or otherwise, made to secure the payment of a sum exceeding one hundred dollars and not exceeding five hundred dollars, fifty cents; exceeding five hundred dollars, and not exceeding one thousand dollars, one dollar; and for every additional five hundred, or fractional part thereof, in excess of one thousand dollars, fifty cents. Act June 30, 1864, c. 173, § 170, Sch. B. Under act June 30, 1864, c. 173, § 170, Sch. B., a stamp duty is required to be paid on every assignment of a mortgage equal to that imposed on the original instrument. But under act of July 14, 1870, c. 255, § 4, no stamp is required upon an assignment of a mortgage, where it or the instrument it secures has been once duly stamped. It is understood that the assignment of a mortgage

now where the consideration consists of any stock or security the value is to be ascertained as pointed out in the act, and is to be deemed the purchase money. *(h)* Any *separate* deed of covenant on a sale for the conveyance or release of such estate, or for the title to or quiet enjoyment, freedom from incumbrances or further assurance of the same estate or otherwise by way of indemnity in respect of the same, or for the production of the title deeds or muniments of title, or for all or any of those purposes, is liable at most to an *ad valorem* duty of 10s. *(i)* And this seems clearly to include a covenant upon a sale in lots from one purchaser to another to produce the title deeds as well as a covenant from the seller for the like purpose.

4. The act *(k)* provides for the mode in which the duty shall be charged in various cases. 1. Where there are several joint purchasers and the property is conveyed in parts by separate deeds, for distinct parts of the purchase money, the principal or only deed of each separate part is charged with the *ad valorem* duty in respect of the consideration for the same. But if separate parts are conveyed to different persons by the same deed, then such deed is charged with the *ad valorem* duty on the aggregate amount of the purchase moneys. 2. Where the property is conveyed immediately to a subpurchaser, the principal or only deed is charged with the *ad valorem* duty in respect of the purchase money paid by the *subpurchaser*. 3. Where the conveyance is by the original seller, to several subpurchasers in parts, the principal or only deed of conveyance of each part is charged with the *ad valorem* duty, in respect *only* of the purchase or consideration money paid by each subpurchaser, *without regard to the amount of the original purchase money*. 4. And in all cases of such subsales, the subpurchasers and the persons immediately selling to them are to be deemed and taken to be the purchasers

given before the passage of the stamp acts, never having been, is required to be stamped, under the above act of June 30, 1864. Whenever any bond or note shall be secured by a mortgage, but one stamp shall be required to be placed on such papers, provided that the stamp duty placed thereon shall be the highest rate required for such instruments, or either of them. Act June 30, 1864, c. 173, § 160. The party

who makes, signs, or issues the instrument, or for whose use it is made, has the duty of paying the stamp tax. Act June 30, 1864, c. 173, § 151. See *Callaghan v. M'Credy*, 48 Penn. St. 463.]

(h) 13 & 14 Vict. c. 97, Sch. Conveyance; *Ib.* Progressive Duty.

(i) Sch. Covenant.

(k) 55 Geo. 3, c. 184; Sch. Part I. Conveyance.

and sellers, within the meaning of the stamp acts. 5. But where any subpurchaser shall take an actual conveyance from the original purchaser, which shall be charged with the *ad valorem* duty, any conveyance to be afterwards made to him by the original seller is to be exempted from the *ad valorem* duty. 6. And where any property separately contracted to be purchased of different persons, at distinct prices, shall be conveyed to the purchaser by one deed, such deed is to be charged with the *ad valorem* duty in respect of the aggregate amount of the purchase moneys. 7. And where any property shall be sold and conveyed, in consideration, wholly or in part, of any sum charged thereon by mortgage or otherwise, and then due to the purchaser, or shall be * sold and conveyed subject to any mortgage or other debt, or to any gross or entire sum of money to be afterwards paid by the purchaser, such sum of money or debt is to be deemed the purchase money or part of the purchase money, in respect whereof the *ad valorem* duty is to be paid.

5. This seventh provision had been held to mean where the purchaser stipulates to pay it; a conveyance merely subject to the charge therefore was not liable to the duty on the mortgage money.^(l) But now, when the property is sold and conveyed subject to any mortgage bond or other debt, such sum of money or debt is to be deemed the purchase money, or part thereof, in respect whereof the *ad valorem* duty shall be paid, notwithstanding the purchaser shall not become personally liable, or shall not undertake or agree to pay the same, or to indemnify the vendor or any person against the same.^(m)

6. Whatever is transferred by the deed of conveyance, for example, timber or fixtures, will be deemed part of the property liable to *ad valorem* duty, although a separate price is put upon it. The duty attaches on the sale of good will, although this was thought not to be so. Assignments on or previously to 15th June, 1854, are protected and made available in evidence, although the *ad valorem* stamp is not the proper one.⁽ⁿ⁾

7. Under the 13 & 14 Vict. c. 97, it was held that where the consideration expressed in the conveyance is a rentcharge or annuity, subject to repurchase, the *ad valorem* duty attached only

(l) Marquis of Chandos v. Commissioners of Inland Revenue, 6 Ex. 464.

(m) 16 & 17 Vict. c. 59, s. 10.

(n) 17 & 18 Vict. c. 83, s. 19.

where such repurchase might be enforced at the option of the vendor; (o) but by the later act 16 & 17 Vict. c. 59, s. 11, the duty is made chargeable in all cases where such rentcharge, or annuity is made redeemable. And by a later act of the same session, which with its title is so framed as probably to escape the attention of the general practitioner, (p) every conveyance (not being a lease) in consideration of any annual sum payable in perpetuity, or for any indefinite period, was made liable to certain duties, so as to extend them to irredeemable annuities. These duties have since been repealed, and other progressive duties, according to the amount of the annual sum, imposed upon every conveyance in consideration of an annual sum payable in perpetuity, or for any indefinite period, whether fee farm or other rent, with exemptions of certain leases for lives, which are left liable to the duties previously to the 16 & 17 Vict. c. 63. (q) And where any conveyance or contract shall be made partly in consideration * of such annual sum, and partly in consideration of a sum of money or stock, the same will be chargeable with the *ad valorem* stamps granted by the several acts; (r) and where the deed is made also for any further or other valuable consideration, it is chargeable (except where specially exempted) with such further duty as any separate deed for such last mentioned consideration alone would be chargeable with, except progressive duty. (s)

8. Although the stamps used are of an improper denomination, yet if of equal or greater value in the whole with or than the proper stamps, the deed will be valid, except the stamps used are specifically appropriated to any other instrument by having its name on the face thereof. (t)

9. The 55 Geo. 3 provides for what shall be deemed the principal deed or instrument in certain specified cases, and in

(o) *In re* Stamp Duty; Gell's Conveyance, 8 Ex. 376.

(p) 16 & 17 Vict. c. 63, s. 1, and Sch. As to duplicates of deeds under this statute, see the relief provided by 17 & 18 Vict. c. 83, s. 15.

(q) 17 & 18 Vict. c. 83, s. 1, and Sch.

(r) *Ib.*; 13 & 14 Vict. c. 97, and Sch.

(s) 17 & 18 Vict. c. 83, s. 16.

(t) 55 Geo. 3, c. 184, s. 10. [Under the corresponding provision in the United States internal revenue acts, no instrument shall be held invalid for want of the particular kind of stamp designated for that instrument, provided a legal stamp denoting a duty of equal amount shall have been duly affixed and used thereon. June 30, 1864, c. 173, § 152.]

other cases leaves it to the parties to determine which shall be so deemed.^(u)

10. Of course, an agreement is only to be stamped as such, and not with an *ad valorem* stamp, which is imposed only upon the conveyance whether the interest be legal or equitable,^(x) although it may possibly happen that a purchaser might, to avoid the payment of the duty, not take a conveyance of the equitable interest; but there is no danger of many such cases occurring,[†] as a purchaser of an equitable estate is always desirous of having a regular conveyance with regular covenants, and without it might find it difficult to obtain at the proper period a conveyance of the legal estate.

11. The real consideration is required to be set forth in conveyances,^(y) under severe penalties upon the seller and purchaser, and the person preparing the deed; and the purchaser may recover from the seller so much of the purchase money as shall not be truly set forth in the deed.^(y¹) But this direction has properly been held not to vitiate the deed,^(z) so that al-

(u) *Ib.* Sch. Conveyance.

(x) *Wilnot v. Wilkinson*, 6 B. & C. 506; see *Boone v. Mitchell*, 1 B. & C. 18. [Such is the law under the United States internal revenue act of June 30, 1864, c. 173, § 170, Sched. B.]

(y) 48 Geo. 3, c. 149, s. 22-26; 55 Geo. 3, c. 184, s. 8; 13 & 14 Vict. c. 97; Sch. Conveyance.

(y¹) [To a suit for the purchase money of land, the defendant answered that the true consideration for the land was much more than that named in the deed, and that the grantor had caused the consideration to be stated in the deed at a less sum than the true amount for the purpose of defrauding the government of the proper stamp duty under the United States internal revenue acts, and to render the defendant's deed invalid; but the answer was held to be no bar to the action. *Lambert v. Whitelock*, 29 Ind. 26. The United States supreme court has not jurisdiction to review a final judgment or decree by the highest court of law or equity of a State, that revenue stamps attached to a deed offered in evidence and objected to as not

having stamps proportioned to the value of the land conveyed are sufficient. *Lewis v. Campan*, 3 Wallace, U. S. 106.]

(z) *Robinson v. Macdonnell*, 5 Mau. & Sel. 228; *Duck v. Braddyll*, 13 Pricc. 455. [It was decided in *Green v. Holway*, 101 Mass. 243, upon a careful collation and an elaborate review of the various provisions of the United States internal revenue acts affecting the subject, that the provisions of the act of 1866, c. 184, § 9, that any person who shall make, sign, or issue any instrument without being duly stamped, with intent to evade the provisions of the act, shall be subject to a penalty, and that "such instrument" shall be deemed invalid, and of no effect, do not, construed in connection with the other provisions of the statute, render instruments not duly stamped at first, absolutely void, without proof that the stamp was omitted with intent to defraud the revenue. In accordance with this decision are the cases of *Beebe v. Hutton*, 47 Barb. 187; *McGovern v. Hoestbeck*, 53 Penn. St. 176; *Dudley v. Wells*, 55 Maine, 145; *Whitehill v. Spickle*, 43 Missou. 537; *Hallock v. Jor-*

though the whole price is not stated and the duty paid upon it, yet the deed will be valid if it is stamped according to the consideration stated upon the face of it. (a) (1)

12. And a seller may reduce, if he please, the amount to be actually paid, so as to enable the purchaser to bring his purchase deed within a lower class of duty, or in other words, to evade the * higher duty, (b) which can often be accomplished without any real sacrifice.

13. Where the purchaser is authorized to distribute the purchase money between the several conveyances of a property which requires different modes of conveyance, it has always been considered that the purchase money may, if it can, be so apportioned as to lessen the amount of duty which would have

din, 34 Cal. 167; *Vaughan v. O'Brien*, 57 Barb. 491; *Vorebeck v. Roe*, 50 Barb. 302; *Blunt v. Bates*, 40 Ala. 470, 475; *Latham v. Smith*, 45 Ill. 29; *Hunter v. Cobb*, 1 Bush, 239; *Tobey v. Chipman*, 13 Allen, 123; *Govern v. Littlefield*, 13 Allen, 127, note; *Willey v. Robinson*, 13 Allen, 128, note; *Ritter v. Brendlinger*, 58 Penn. St. 68; *Tripp v. Bishop*, 56 Penn. St. 424; *Sawyer v. Parker*, 57 Maine, 39; *Hitchcock v. Sawyer*, 39 Vt. 412; *Schermerhorn v. Burgess*, 55 Barb. 422; *Cook v. England*, 27 Md. 14; *Adams v. Dale*, 29 Ired. 273; *Morris v. McMorris*, 44 Miss. 441; *Hallock v. Jordin*, 34 Cal. 167; other cases hold the contrary. *Maynard v. Johnson*, 2 Nev. 25; *Wayman v. Torreyson*, 4 Nev. 124; *Plessinger v. Depuy*, 25 Ind. 419; *The City of Muscatine v. Sterneman*, 30 Iowa, 526; *Hugus v. Strickler*, 19 Iowa, 413; *Miller v. Morrow*, 3 Coldw. 587; *Miller v. Larmon*, 38 How. Pr. 417; *Beebe v. Hutton*, 47 Barb. 187; *Harper v. Clark*, 17 Ohio, 190. In a case where an agreement offered in evidence was objected to on the ground that it was not stamped, and there was no offer to show that the stamp was omitted

by mistake, inadvertence, or ignorance, or any other excuse given for the omission, and no offer to affix it was then made, the agreement was held invalid and rejected. But in a later and very recent case in the court of appeals in New York, it was decided that a deed is not invalid because not duly stamped, on the broad ground that it is not within the constitutional powers of congress to prescribe for the States a rule for the transfer of property within them. *Moore v. Moore*, 47 N. Y. 467. See also *People v. Gates*, 43 N. Y. 40; *Davy v. Morgan*, 56 Barb. 218; see *Howe v. Carpenter*, 53 Barb. 382. By express provision of the act of July 13, 1866, c. 184, § 9, the title of a purchaser of land by deed duly stamped shall not be defeated or affected by the want of a proper stamp or any deed conveying said land by any person from, through, or under whom his grantor claims or holds title. This same provision was in the act of June 30, 1864, c. 173, § 158.]

(a) *Parry v. Deere*, 4 Ad. & El. 551, where the amount of the rent was not mentioned, and it was shown by parol.

(b) *Shepherd v. Hall*, 3 Ca. 180.

(1) The duty on a bargain and sale for a year is repealed, 13 & 14 Vict. c. 97, s. 6; and so is the additional duty when the conveyance is by feoffment or bargain and sale enrolled, not accompanied by a lease and release, s. 7.

been payable on the aggregate sum, and the words of the statute appear expressly to authorize this view.

14. However numerous the parties to a conveyance may be, and whether they have the fee, some legally and some equitably, as in the case of mortgagors and mortgagees, or for different estates, as in the case of tenant for life and remainder-men, or are severally interested in the estate, as in the case of tenants in common, only one set of stamps is necessary, and it is indifferent whether the conveyance is to one purchaser or to several jointly, or as tenants in common.(c) The statute even provides, as we have seen, that where several persons convey by one deed property separately contracted to be purchased at distinct prices, the *ad valorem* duty shall be paid on their aggregate amount, and that where under a joint purchase separate parts are conveyed to different persons by the same deed, the duty is to be paid in like manner on the aggregate amount.(d) A deed of confirmation by the seller (where the conveyance with an *ad valorem* stamp was executed by an attorney without authority) was of course held not to require an *ad valorem* stamp.(e) But a sale by several tenants in common of a copyhold to the same person, although effected by one surrender, will not lessen the fees and stamps on admittance.(f)

15. Where a conveyance on the sale of any property operates also as a conveyance of any other than the property sold, by way of settlement, or for any other purpose, or contains any other matter or thing besides what is incident to the sale and conveyance of the property sold, or relates to the title thereto, the deed is liable to the same duty (exclusive of progressive duty) as a separate deed containing the other matter would be chargeable with.(g)

16. But this does not seem to affect a conveyance of the prop-

(c) *Willis v. Bridge*, 4 Ex. 193.

(f) *The Queen v. Eton Coll.* 5 C. B.

(d) 55 Geo. 3, c. 184, Conveyance, Sch. Part I; see now 13 & 14 Vict. c. 97, Sch. Conveyance, Covenant, Prog. Duty. As to leases of separate farms by the same person at different rents, &c., *Blount v. Pearman*, 1 Bing. N. C. 408; 13 & 14 Vict. c. 97, Sch. Lease or Tack.

526.

(g) 55 Geo. 3, c. 184, Conveyance, Sch. Part I.; *Hartwright v. Fereday*, 12 Ad. & El. 23; as to a separate deed of covenant on a sale, *sup.*; 13 & 14 Vict. c. 97, Sch. Covenant; *Rushbrook v. Hood*, 5 C. B. 131.

(e) *Doe v. Weston*, 2 Q. B. 249.

erty sold to such uses as the purchaser may choose to direct; (*h*) and of *course no additional stamp is necessary where the deed contains only what is incidental to it, *e. g.* a covenant to produce deeds, or, before the law was altered, an assignment of terms to attend the inheritance. (*i*)

17. Where, in a lease, a third party joined to enter into a covenant for payment of the rent, the lease stamp alone of 1*l.* 10*s.* was held to be sufficient; for the covenant was only ancillary to the lease, and the question was, what was the leading character of the instrument. (*k*) And a lease with a right of purchase in the lessee was held to require only a lease stamp, and not an agreement stamp also. (*l*) But a sale by an intended lessee of his interest, and a lease by his direction to the purchaser, is a sale within the stamp acts, and the lease requires the *ad valorem* duty. (*m*)

18. The common indorsements, such as attestations, receipts, or the like, are counted as part of the deed; but certificates of enrolment or registry, it is apprehended, would not; (*n*) for they are not within the control of the parties at the time of the execution of the deeds.

19. If an inventory be referred to by an agreement as annexed thereto, although it be not annexed until after the execution of the agreement, it will be counted as part of the agreement in fixing the duty, and it is unimportant that the inventory is stamped as such. (*o*)

20. A mere attornment in writing requires no stamp. (*p*)

21. It seems clear that where an *ad valorem* stamp is imposed, a deed stamp is not necessary, although the former is less in amount than 1*l.* 15*s.* (*q*) but the exemption from further *ad valorem* duty, as in the case of a further security for a sum upon

(*h*) Covent. on Stamps, 276.

(*i*) Wolseley *v.* Cox, 2 Q. B. 321; Rushbrook *v.* Hood, 5 C. B. 131.

(*k*) Pratt *v.* Thomas, 4 C. & P. 554; see Doe *v.* Phillips, 11 Ad. & El. 796.

(*l*) Worthington *v.* Warrington, 5 C. B. 636.

(*m*) Atty. Gen. *v.* Brown, 3 Ex. 662; 13 & 14 Vict. c. 97, Sch. Lease or Tack; but past transactions are rendered valid, 13 & 14 Vict. c. 97, s. 10.

(*n*) Coventry, Stamps, 93, *contra*.

(*o*) Veal *v.* Nicholls, 1 Mo. & Rob. 248; see the duty imposed by 13 & 14 Vict. c. 97, Sch. "Sched. Inventory, or Catalogue."

(*p*) Doe *v.* Edwards, 5 Ad. & El. 95.

(*q*) See Warren *v.* Howe, 2 B. & C. 282; Clayton *v.* Burtenshaw, 5 B. & C. 41; Doe *v.* Wheeler, 2 Ad. & El. 28; Doe *v.* Gray, 3 Ad. & El. 89; Doe *v.* Roe, 4 Bing. N. C. 737.

which that duty has already been paid, will not prevent the necessity of a deed stamp.(r)

22. If a conveyance to a purchaser be also a mortgage, it will require two *ad valorem* stamps, one upon the sale and the other upon the mortgage.(s)

23. An award under an inclosure act allotting a parcel of land to a purchaser, does not subject the award to an *ad valorem* stamp.(t) But a deed of assignment executed by the sheriff, on a sale under a *fieri facias*, requires an *ad valorem* stamp.(u)

* 24. Although the only conveying party has executed the deed, yet if upon the objection of another party a clause is struck out, and he reexecute it, and the other parties execute it, a new stamp is not necessary, if upon all the circumstances the fair conclusion is, that the execution may be considered as *in fieri* only.(x)

25. The progressive duty does not attach on any deed or instrument in respect of any other instrument liable to duty and duly stamped, indorsed upon, or annexed or referred to in such deed or instrument.(y)

26. If a receipt for purchase money be not properly stamped, it cannot be received as evidence to prove the contract; (z) but if it contains everything necessary to prove the contract, and is stamped accordingly, it is admissible to prove the contract, although not to prove the payment of the money.(a)

27. Where an estate was sold subject to a certain agreement for a lease, and it afterwards appeared that the agreement was unstamped, upon a claim filed by the purchaser, the seller was ordered to deliver the agreement as a valid binding agreement.(b)

(r) *Lant v. Peace*, 3 Nev. & Per. 329; 8 Ad. & El. 248; *Brown v. Pegg*, 6 Q. B. 1.
(s) 55 Geo. 3, c. 184, Sch. Mortgage; and as to mortgages, see 3 Geo. 4, c. 117.

(t) *Doe v. Preston*, 7 B. & C. 392.

(u) *Nagle v. Ahern*, 3 Ir. L. R. 41.

(x) *Jones v. Jones*, 1 Cro. & Me. 721.

(y) S. 11.

(z) *Evans v. Prothero*, 2 Mac. & G. 319.

[See *ante*, 566, note (f).]

(a) S. C. 1 De G., M. & G. 572.

(b) *Smith v. Wyley*, 16 Jur. 1136.

[Upon the question, what party must affix the stamp, the decisions are not uniform. See *Myers v. Smith*, 48 Barb. 614; *Schermerhorn v. Burgess*, 55 Barb. 422; *McGovern v. Hoesback*, 53 Penn. St. 176; *Maynard v. Johnson*, 2 Nev. 17; *Adams v. Dale*, 29 Ind. 273.]

SECTION III.

OF COVENANTS FOR TITLE.

- | | |
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| <ol style="list-style-type: none"> 1. Attorney answerable to seller for improper covenants. 2. Usual covenants. 3. Synonymous covenants. 4. Agreement to take bad title with covenants. 5. Right to covenants under agreement. 6. Vendor who bought covenants against himself only. — Even though he retains the deeds. 7. Vendor who did not buy covenants against last purchaser. 8. Restricted in equity. 9. No covenants for title where estate sold under will for debts, &c. — Or by a court of equity. | <ol style="list-style-type: none"> 10. Practice in those cases. 11. Purchaser entitled to covenants if parties entitled to the money. 12. Or the debts are paid. 13. No covenants upon sales by the crown or assignees. 14. Practice as to bankrupts. 15. Tenant for life to covenant. 16. Husband covenants on sale of wife's estate. 17. Trustees, only no act to incumber. 18. Purchaser not entitled to unbroken chain of covenants. 19. Short form of statute covenants. |
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1. WE may now, in connection with the conveyance, proceed to consider to what covenants for title a purchaser is entitled. This is a point to which the attention of the seller's attorney should be particularly drawn; for if he permit his client to enter into an unusual *covenant for title without explaining to him the liability he thereby incurs, he (the attorney) will be liable to the client for consequent loss, although the client was aware at the time he entered into the covenant of the fact in respect of which the liability on his covenant was incurred.(a)

2. The covenants usually entered into by a vendor seised in fee, are, 1st, that he is seised in fee; (a¹) 2dly, that he has power to convey; 3dly, for quiet enjoyment by the purchaser, his heirs and assigns; 4thly, that the estate is free from incumbrances; and lastly, for further assurance.(b)

3. Where a vendor has only a power of appointment, the first covenant ought to be that the power was well created and is subsisting; and the other covenants should be similar to those

(a) *Stannard v. Ullithorne*, 10 Bing. 491; 4 Mo. & Scott, 359.

(a¹) [This is a personal covenant not running with the land nor passing to the assignee. *Post*, 577, note; 4 Kent (11th ed.), 471; *Swasey v. Brooks*, 30 Vt. 692.

It implies that the grantor has the whole title. *Mills v. Catlin*, 22 Vt. 98.]

(b) *Post*, ch. 15, s. 2. [See 2 Cruise Dig. by Mr. Greenleaf, vol. 4, tit. 32, Deed, ch. 26, § 47 *et seq.* & notes.]

entered into by a grantor seised in fee. In small purchases the first covenant is sometimes omitted, which may be safely done, for the first and second are synonymous covenants.^(b)

4. Where a purchaser consents to take a defective title, relying for his security on the vendor's covenants, the agreement of the parties should be particularly mentioned,^(c) and unless the objection to the title appear on the face of the conveyance, the covenants to guard against it should be entered into by a separate instrument.

5. If, says Lord Eldon, a man covenants to sell a fee simple estate free from all incumbrances, and says no more, it is clear that covenant carries *in gremio* and in the bosom of it the right to proper covenants. Why? Because that sort of engagement has in all times been carried into execution in a form and mode which alter most materially, substantially, and importantly the effect of the mere conveyance. If no more is done than the agreement imports, the conveyance contains express covenants; the words [in the conveyance] operating warranties and obligations which it was not understood between the parties contracting that the one was to undertake and the other to have the benefit of; and accordingly it is perfectly settled by the law what are the covenants as applied to the case of a vendor who was himself a purchaser for valuable consideration, or who took by descent or by purchase, but not for valuable consideration; and though the agreement, if literally executed, would carry all the extensive obligations to which the legal warranties flowing from the words would bind the vendor and his heirs, yet it cannot be carried into execution without express covenants substituted for and limiting the implied covenants. In such a case the law would determine what are usual covenants.^(d)

(b) [Per Parsons C. J. in *Marston v. Hobbs*, 2 Mass. 437; *Slater v. Rawson*, 1 Met. 455, 456, per Dewey J.]

(c) *Butler, u.* (1) Co. Litt. 384 a; *Savage v. Whitbread*, 3 Cha. R. 14; *Ex parte Collins*, 2 Ir. C. R. 618. [See *Beck v. Simmons*, 7 Ala. 71. The grantor will be liable on his covenant against incumbrances, although the grantee knew of the existence of the incumbrance at the time when the deed was executed. *Townsend v.*

Weld, 8 Mass. 146; *Harlow v. Thomas*, 15 Pick. 66; *Hubbard v. Norton*, 10 Conn. 431; *Kellogg v. Ingersoll*, 2 Mass. 97; *Dunn v. White*, 1 Ala. 645; *Cathcart v. Bowman*, 5 Barr, 31; see *Swan v. Drury*, 22 Pick. 485; *Tharin v. Ficklin*, 2 Rich. 361.]

(d) *Church v. Brown*, 15 Ves. 263; see 8 & 9 Vict. c. 106, s. 4. [See *Sargent v. Adams*, 3 Gray, 81. The character of the deed of conveyance which the purchaser

* 6. With respect to the *persons* against whose acts a vendor is bound to covenant: A vendor who actually purchased the

has a right, to require, will depend upon the language of the agreement to convey. The following are instances of the construction which has been given in various cases and by different courts, to the language used in agreements or covenants to convey. A deed of quitclaim without warranty or other covenants has been held sufficient to satisfy an agreement to sell and convey land with a good title. *Kyle v. Kavanagh*, 103 Mass. 356; so an agreement to give a deed of the premises; *Ketchum v. Evertson*, 13 John. 359; so an agreement to give a good and sufficient deed of the premises, *Gazley v. Price*, 16 John. 267; so an agreement to execute a deed to the vendee, his heirs and assigns forever, *Van Eps v. Schenectady*, 12 John. 436. In a late case in New York it was held that an agreement for a "warranty deed" requires only the common covenant of warranty. A covenant against incumbrances is not necessary. *Wilsey v. Dennis*, 44 Barb. 354. In *Tinney v. Ashley*, 15 Pick. 546, the vendors had agreed to give a good and sufficient warranty deed of the premises, and the court, by Wilde J. said: "The words 'good and sufficient' relate only to the validity of the deed to pass the title which the vendors had, and do not imply that their title was valid, or that it was free from incumbrances. To guard against any defect of title a covenant of warranty was provided for; which shows clearly that the agreement was so understood by the parties." So in *Parker v. Parmele*, 20 John. 130, the words a "good warranty deed of conveyance of the land" were regarded as relating to the instrument of conveyance only, and not to the title. See *Aiken v. Sandford*, 5 Mass. 294. But in *Fletcher v. Button*, 4 Comst. 396, a contract to give a good and sufficient deed of land, free from all incumbrances, was held not to be satisfied by a deed containing covenants of warranty and against incumbrances, where the

grantor had not the legal title to the premises. And in this last case the decisions in *Gazley v. Price*, and *Parker v. Parmele*, above cited, were reviewed and questioned. See S. C. 6 Barb. 646; *Hill v. Ressegien*, 17 Barb. 162; *Clute v. Robinson*, 2 John. 213. And in *Atkins v. Bahrett*, 19 Barb. 643, Brown J. said: "In *Carpenter v. Bailey*, 17 Wend. 244, the cases of *Gazley v. Price* and *Parker v. Parmele* were in effect overruled," and after a careful examination of the authorities he concludes that "when a man buys a piece of land, and contracts for a conveyance in general terms, the presumption is, that he expects the title, and the grantor should be required to give him a perfect title." See *Pomeroy v. Drury*, 14 Barb. 418. In a case where the terms and conditions of a public sale of land were, that warranty deeds should be given; that purchasers should have ten days to examine the title; and that upon those terms the vendor would execute deeds to the purchasers; it was held that the vendor was bound by the terms of sale to make a good title to the land, and that a purchaser could not be compelled to complete his purchase, upon receiving a warranty deed from the vendor, it appearing that the title was not clear and that the land was incumbered. *Mead v. Fox*, 6 Cush. 199. In *Hill v. Hobart*, 16 Maine, 164, there was a contract to make and execute "a good and sufficient deed to convey the title to the premises," and this was held not to be performed unless a good title to the land passed by the deed. *Shepley J.* said: "This is a point of such importance that a careful examination might be expected. The rule in equity is clear, and well established, requiring a perfect title to be made, unless the contrary has been agreed. A person is never supposed to be desirous of purchasing a lawsuit, or a title attended with doubt and vexation, instead of one upon which he can quietly repose. Mr.,

estate himself, for money, or other valuable consideration, is not bound to enter into covenants extending beyond his own acts.(e)

Sugden says: 'A court of law will look as anxiously to see that the title is clear of doubt, as a court of equity would.' Among the cases at law examined, there are several where the contract has been decided to be performed by giving a deed where there were defects in the title. Such decisions have usually turned upon the peculiar phraseology of the contract. Without asserting that they can all be perfectly reconciled, it is believed that the general principle to be collected from them is, that when the contract stipulates for a conveyance of the land or estate, or for the title to it, performance can be made only by the conveyance of a good title. And when it stipulates only for a deed, or for a conveyance by a deed described, performance is made by giving such a deed as the contract describes, however defective the title may be." See, also, *Tharin v. Ficklin*, 2 Rich. 361; *Breithaupt v. Thurmond*, 3 Rich. 216; *Tremain v. Liming*, Wright, 644; *Lloyd v. Farrell*, 48 Penn. St. 73. Where the covenant is to execute a good and valid deed of land with the usual covenants, the vendor must give a deed which conveys a good and sufficient title; *Stow v. Stevens*, 7 Vt. 27, and see *Lawrence v. Dole*, 11 Vt. 549; so where the vendor is "to give a good and perfect deed" to land, *Greenwood v. Ligon*, 10 Sm. & M. 615; *Feemster v. May*, 13 Sm. & M. 275; or is "to give a good and sufficient deed in law to vest the purchaser with the title" to the land, *Jones v. Gardner*, 10 John. 266; or to "make a warranty deed, free and clear of all incumbrances," *Porter v. Noyes*, 2 Greenl. 22; or to sell and convey a parcel of land, "the title to be a good and sufficient deed," *Brown v. Gammon*, 14 Maine, 276; or to execute a proper deed, conveying the fee simple of certain premises, with full covenants, *Traver v. Halsted*, 23 Wend. 65; or to convey "by a good and sufficient warranty deed, in fee simple, free and

clear of all incumbrances," *Guerdon v. Kirtland*, 4 Paige, 628; or to make a lawful title, *Clark v. Redman*, 1 Blackf. 380; or to give "a good and sufficient deed with covenant of warranty," *Tindall v. Conover*, 1 Spencer, 214; or "to grant, convey, and assure to the vendees a certain tract of land, by a good and sufficient deed, to be made and executed according to law, with proper covenants of seisin, right to convey, against incumbrances and of warranty," *Little v. Paddleford*, 13 N. H. 167; or to sell land, "and to convey and release the same by a good and sufficient deed," *Story v. Conger*, 36 N. Y. 673; so where the vendor recites that he is the owner of the premises, and states that he is to convey the same to the purchaser "by a good and sufficient deed," *Taft v. Kessel*, 16 Wis. 273. A contract to convey by a good and sufficient warranty deed requires a deed with relinquishment of dower, if a right to dower exists. *Devar v. Cardwell*, 27 Ind. 478. In these and other like cases, it has been held, that the mere giving a deed with warranty, where the grantor has no title to the land, or where his title is imperfect or incumbered, is not a compliance with the agreement or covenant, but the conveyance must be sufficient to vest the legal estate absolutely in the purchaser, free and clear of all incumbrances. See, also, *Beach v. Steele*, 12 N. H. 82; *Babcock v. Wilson*, 17 Maine, 372; *Warner v. Hatfield*, 4 Blackf. 392; *Dearth v. Williamson*, 2 Serg. & R. 498; *Withers v. Baird*, 7 Watts, 237; *Gilechrist v. Bine*, 1 Dev. & Bat. Eq. 346; *Watts v. Waddle*, 1 McLean, 200; *Clute v. Robison*, 2 John. 595; *Judson v. Wass*, 11 John. 525; *Carpenter v. Bailey*, 17 Wend. 244; *Pugh v. Chesseldine*, 11 Ohio, 109; *New Barba-*

(e) 2 Bos. & Pul. 22; *Opins.* in 3 Pow. Convey. 206, 210; *Fearne*, Posth. 110; *Ld. Buckhurst's case*, 1 Rep. 1. [See *Gilchrist v. Bine*, 1 Dev. & Bat. Eq. 346.]

If a vendor is entitled to retain the deeds, he enters into the usual covenant for the production of them, but never enters into more extensive covenants for the title, on account of the retention of the deeds.

7. Where a vendor does not claim by purchase; (*f*) that is, by way of bargain and sale for valuable consideration, a purchaser is entitled to require covenants from such vendor, extending to the acts of the last purchaser. For instance, if I sell an estate which was devised to me, and the devisor's father purchased the estate, the covenants for title are extended to the acts of the father. (*g*) And a person claiming under a voluntary conveyance is considered in the same light as a devisee. So a

does *Toll Bridge v. Vreeland*, 3 Green Ch. 157; *Rucker v. Lowther*, 6 Leigh, 259; *Patterson v. Goodrich*, 3 Texas, 331; *Cunningham v. Sharp*, 11 Humph. 116; *Fitch v. Casey*, 2 Greene (Iowa), 300. An agreement that the title shall be "good and satisfactory," means that a title shall be given which ought to be satisfactory — to which there can be no reasonable objection. *Fagan v. Davison*, 2 Duer (N. Y.), 153. The purchaser is not the sole judge of the sufficiency of the title in such a case, but the title should be a good marketable one, of which the court must judge, if the parties disagree. *Regney v. Coles*, 6 Bosw. (N. Y.) 479. Where the contract was for the sale of a farm, and it was agreed that a part of the purchase money should be paid when the deed was ready, and the residue in annual instalments, it was held that the vendor could not claim payment of any part of the purchase money until he had tendered to the purchaser an unincumbered title to the farm; and that it was not sufficient to tender a warranty deed, the farm being subject to a mortgage then due, and parol evidence to show that, at the time when the contract was made the purchaser knew that the farm was subject to the mortgage, was rejected. *Swan v. Drury*, 22 Pick. 485. *Wilde J.* said: "The agreement was to convey the farm, which must be construed as an agreement to convey a

good title free from all incumbrances." See to the same effect, *Tharin v. Ficklin*, 2 Rich. 364; *Little v. Paddleford*, 13 N. H. 167; *Nelson v. Matthews*, 2 H. & M. 164. An agreement "to sell" lands binds the party to execute a proper deed of conveyance. *Smith v. Haynes*, 9 Greenl. 128. Where one agrees to convey by quitclaim, the agreement has reference to the title as it is at the time of the agreement; not to one subsequently acquired. *Woodcock v. Bennet*, 1 Cowen, 711. Where the vendor agrees "to make a valid deed" of land, the purchaser is not bound to accept the deed of a stranger. *Hussey v. Roquemore*, 27 Ala. 281. But see *Dresel v. Jordan*, 104 Mass. 407; *Bateman v. Johnson*, 10 Wis. 1; where it was held that it was sufficient compliance with an agreement to deliver "a good and sufficient deed of conveyance," if the vendor having no good title in himself procures a good conveyance from the person having the title. But specific performance will not be decreed against one who has contracted to convey to the plaintiff land of which he was not the owner, the plaintiff knowing that the defendant was not the owner, and it being expressly stipulated that the deed was to come from a third person. *Hill v. Fiske*, 38 Maine, 520.]

(*f*) 2 Black. Com. 241.

(*g*) 3 Pow. Conv. 206, 210.

person whose estate is sold under an order of a court of equity, or by a trustee to whom he has conveyed it upon trust to sell, is bound to covenant for the title in the same manner as he must have done if he himself had sold the estate.

8. But although the *universal and settled practice* of conveyancers is, to extend covenants for the title to the acts of the last purchaser, yet the court of chancery appears to hold, that a person not claiming by purchase is only bound to covenant against his own acts, and those of the person immediately preceding him.^(h)

9. Where an estate is sold by trustees under a will, and the money is to be applied in payment of debts, &c., and the residue is given over, a purchaser is not entitled to any covenants for the title, because no line can well be drawn as to the *quantum* which would make a person liable to covenant.⁽ⁱ⁾ The same rule applies *ex necessitate* where an estate is sold for similar purposes under an order of a court of equity. The title can be made by the trustees for sale, without calling in the parties who are presumptively beneficially interested.^(k)

10. In both these cases, the rule of the court of chancery differs from the practice of the profession; for it always has been, and still is, the practice of the profession to make all the *cestuis que trust*, whose shares of the purchase money are in any wise considerable, join in covenants for the title, according to their respective interests.^(k¹)

11. Where the money to arise by sale of the estate is absolutely *given to two or more persons, they are substantially owners of the estate, and must accordingly covenant for title.

12. So, even where the money is in the first place to be applied in payment of debts, yet if they are all paid previously to the sale, the *cestuis que trust* must, it is conceived, covenant for the title.

13. In conveyances by the crown, a purchaser is not entitled to any covenants for the title; and where an estate is sold by assignees of a bankrupt, the purchaser is only entitled to a cove-

(h) 3 Atk. 267; 3 Ves. 236; 14 Ves. Ves. 233, 504, aff'd D. P. 8 Bro. P. C. 239. 145; see *Loyd v. Griffith*, 1 Atk. 264.

(i) *Wakeman v. Duchess of Rutland*, 3 (k) 3 Ves. 605, 506.

(k¹) [See *Perry Trusts*, § 787.]

nant from the assignees, that they have not done any act to encumber the estate.

14. But a bankrupt is generally made a party to the conveyance of his estate, to prevent the difficulty which the purchaser might otherwise be put to in maintaining and proving the title, and the bankrupt is generally made to enter into covenants for title, in the same manner as he would have done had he sold the estate while solvent.^(l) This, however, could not be insisted upon.

15. And tenants for life are bound to covenant for title where the estate is sold, with their assent, under a power, or where a power of sale has been obtained by them to be vested in trustees by an act of parliament,^(m) but covenants could not be required where the sale is compulsory under railway acts and the like.

16. Where the wife's estate is sold by her and her husband, he enters into the same covenants as would be required from her, if sole.

17. A mere trustee simply covenants that he has done no act to encumber.⁽ⁿ⁾

18. Although in theory a purchaser is entitled to a regular chain of covenants for title running with the land, and extending to the acts of the successive owners of the property, yet, practically, he is entitled to no such thing, but must rest content with the covenants obtained by former owners, whether they run with the land or are collateral to it, and whether they keep up the chain of liability or leave it altogether broken and disconnected. This observation does not apply to the covenants for title to which a purchaser is entitled from his immediate seller.

19. Here we may again refer to the statute which enables a party to enter into the usual covenants for title, in a short form.^(o)

(l) 12 & 13 Vict. c. 106, s. 148.

inf. ch. 15, s. 2. [See Perry Trusts, §

(m) *In re London Bridge Acts*, 13 Sim. 786.]

176.

(o) 8 & 9 Vict. c. 119.

(n) *Worley v. Frampton*, 5 Hare, 560 ;

* CHAPTER XV.

OF THE CONSTRUCTION OF COVENANTS FOR TITLE.

SECTION I.

WHAT COVENANTS RUN WITH THE LAND.

1. Covenants for title are real ones: right of assignees, heirs, and executors.
2. Right of devisees to action.
3. Such covenants run with term of years.
4. Operation of 32 H. 8, on *cestuis que use*.
5. Covenants run with the seisin.
6. Do not run where covenantee is *cestui que use*, and afterwards appoints. — But do where assignee takes the estate of *cestui que use*.
7. R. P. Commissioners contra.
8. Covenants with appointee run with the land.
10. But not where a power is created by a power.
11. Roach v. Wadham: appointment defeats estate and covenants with it.
12. Distinction as to the legal seisin.
14. Whether there must be privity in vendors covenanting.
16. Privity of estate. — Assignee of lessee bound by and entitled to covenants with lessee: 32 H. 8.
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18. Webb v. Russell: privity of estate.
19. Purchaser's covenants with the seller, a mortgagor.
20. 8 & 9 Vict. c. 106: continuing reversion.
21. Purchaser entitled to covenant against lessee.
23. Covenant to reside, whether it binds a purchaser.
25. Opinion of R. P. C. as to covenants by a stranger running with the land.
26. Coke's opinion: partition: covenant by a prior to perform divine service: Pakenham's case.
27. State of authorities.
28. Manor: Horne's case.
30. Parson covenanting: 6 H. 4.
31. Keppell v. Bailey: purchaser covenanting to keep a shop, &c.
32. King v. Jones: covenant by husband of mortgagor.
33. Vivyan v. Arthur: suit to mill.
34. Milnes v. Branch: rent created by seller's conveyance: covenant by purchaser does not run with it.
37. Rent created by way of use, covenant with grantee does not run. — Whether a covenant to pay with a grantee of a rent will run with it. — Covenant to pay mortgage money does not run. — Nor does covenant by assignee to assignor to pay rent and indemnify.
38. Covenants in gross, how far binding.
39. Where for further assurance, will be specifically enforced.
40. Where the seller's remaining lands are bound by covenants.
41. Grant of watercourse, with covenant to cleanse it.
42. Brewster v. Kidgell: covenant to pay rent in fee does not bind assignee of land, *qu*.
43. Roach v. Wadham: against Holt's opinion. — Opinion of R. P. C. on Roach v. Wadham.
44. Roach v. Wadham explained.
45. Result.

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| <p>46. Covenant to produce deeds.</p> <p>47. Covenants not to build on lands, &c., whether they run with the land: bind in equity.</p> <p>48. Covenant by lessor for right of preëmption of other land does not run.</p> <p>49. Nor similar covenant by lessee.</p> | <p>50. Nor covenant to contribute to expense of establishing a modus.</p> <p>51. <i>Collins v. Plumb</i>: covenant by purchaser of well not to sell the water.</p> <p>52. Preston's opinion, that the remedy under covenants cannot be apportioned.—<i>Observations contra.</i></p> |
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1. COVENANTS for title are frequently termed real covenants, and pass by the common law to the assignees of the land, who may maintain * actions upon them against the vendor and his real and personal representatives.(a) And as the covenants re-

(a) *Middlemore v. Goodale*, 1 Rq. Ab. 521 (K.), pl. 6; *Cro. Car.* 503, 505; *Sir W. Jones*, 406; *Campbell v. Lewis*, 3 B. & Ald. 392; *Lewis v. Campbell*, 8 Taunt. 715; see the provision as to covenants running with the land in the act for converting the renewable leasehold tenure of land in Ireland into a tenure in fee, 12 & 13 Vict. c. 105, s. 10. [The subject of covenants real is confined to lands and tenements, excluding such hereditaments as do not embrace lands and tenements; and privileges of water come within the exclusion. *Mitchell v. Warner*, 5 Conn. 497; *Wheelock v. Thayer*, 16 Pick. 68. Such covenants must respect the thing granted or demised, and the act covenanted to be done or omitted, must concern the lands or estate conveyed. *Nesbit v. Nesbit*, Cam. & N. 324; *Norman v. Wells*, 17 Wend. 136; *Taylor L. & T.* § 260; *Dolph v. White*, 2 Kernan, 296. But it is not necessary that the act in respect to which the covenant is made should be done on the premises demised. *Norman v. Wells*, 17 Wend. 136. A covenant which may run with the land, can do so only where the land itself is conveyed. It can only run when attached to the land as its vehicle of conveyance. *Pike v. Galvin*, 29 Maine, 183, 186, and cases cited; *Wheelock v. Thayer*, 16 Pick. 68. All covenants concerning title run with the land conveyed with the exception of those that are broken before the land passes. 4 Kent (11th ed.), 473; *Martin v. Baker*, 5 Blackf. 232. "The distinction between covenants that

are in gross, and covenants that run with the land," says Mr. Chancellor Kent, "would seem to rest principally on this ground, that to make a covenant run with the land, there must be a subsisting privity of estate between the covenanting parties. A covenant to pay rent, or to produce the title deeds, or for renewal, are covenants of the latter character, and they run with the land." 4 Kent (11th ed.), 472, 473; *Johns v. French*, 1 Hogan, 450; *Ross v. Turner*, 2 Eng. 132; *Masury v. Southworth*, 8 Ohio, 340. The covenant of warranty, and the covenant for quiet enjoyment, are prospective, and an actual ouster or eviction is necessary to constitute a breach of them. They are, therefore, in the nature of real covenants, and they run with the land conveyed, and descend to heirs, and vest in assignees or the purchaser. 4 Kent (11th ed.), 471; *Ross v. Turner*, 2 Eng. 132; *Brown v. Staples*, 28 Maine, 497; *Heath v. Whidden*, 24 Maine, 383; *Martin v. Baker*, 5 Blackf. 232; *Clarke v. Swift*, 3 Met. 390; *Wyman v. Ballard*, 12 Mass. 306; *Sprague v. Baker*, 17 Mass. 586; *Hunt v. Amidon*, 4 Hill, 345; *Suydam v. Jones*, 10 Wend. 180; *Withy v. Mumford*, 5 Cowen, 137; *De Chaumont v. Forsythe*, 2 Penn. 507; *King v. Kerr*, 4 Ham. (Ohio) 156; *Clark v. Redman*, 1 Blackf. 381; *Mitchell v. Warner*, 5 Conn. 497; *Williams v. Bee-man*, 2 Dev. 483; *Markland v. Crump*, 1 Dev. & Bat. 94; *Chase v. Weston*, 12 N. H. 417. If a deed conveys the possession of land, that is estate enough to carry

late to the land, an assignee may maintain an action on them, although they were entered into with the original grantee and

along with it the covenants of warranty and for quiet enjoyment. *Fowler v. Poling*, 6 Barb. 165; *S. C.* 2 Barb. 300; *Slatten v. Rawson*, 6 Met. 439; *Beddoe v. Wadsworth*, 21 Wend. 120. A covenant that neither the grantor nor his heirs shall make any claim to the land conveyed, was held, in *Fairbanks v. Williamson*, 7 Greenl. 96, to be a covenant real which runs with the land and estops the grantor. To the same general effect is *Trull v. Eastman*, 3 Met. 121; *Bennett v. Waller*, 23 Ill. 37; *Van Rensselaer v. Kearney*, 11 How. (U. S.) 297. The force of the decision in *Fairbanks v. Williamson* is very much impaired by subsequent decisions in the same State, *Pike v. Galvin*, 29 Maine, 183; *Harriman v. Gray*, 49 Maine, 537; and others in other States, see *ante*, 556, note. A covenant not to let or establish any other mill site on the same stream to be used for a particular purpose, has been held to run with the land. *Norman v. Wells*, 17 Wend. 136; see *Wheelock v. Thayer*, 16 Pick. 68. So a covenant not to erect a building on a common or public square, owned by the grantor, in front of the premises conveyed. *Watertown v. Cowen*, 4 Paige, 510; *Mann v. Stephens*, 10 Jur. 560; *Stuyvesant v. New York*, 11 Paige, 414; *Perkins v. Coddington*, 4 Rob. (N. Y.) 647; so a covenant to keep or leave in repair; *Shelby v. Hearne*, 6 Yerger, 512; *Demarest v. Willard*, 8 Cowen, 206; *Allen v. Culver*, 3 Denio, 284; *Angell Watercourses* (6th ed.), § 260; *Norman v. Wells*, 17 Wend. 148; *Pollard v. Shaffer*, 1 Dall. 210; *Thompson v. Shattuck*, 2 Met. 615; so a covenant to pay rent; *Hurst v. Rodney*, 1 Wash. C. C. 375; *Van Rensselaer v. Bradley*, 3 Denio, 135; 1 Smith Lead. Cas. (5th Am. ed.) 148; so to rebuild on the land, and to effect insurance, and apply the proceeds in case of a loss by fire, to the reparation of the insured property; *Thomas v. Van Kapff*, 6 Gill & J. 372;

Allen v. Culver, 3 Denio, 284; *Harris v. Coulbourn*, 3 Harr. 338; to open a street on which the land is bounded; *Dailey v. Beck*, 6 Penn. L. J. 383; to supply the premises with water; *Jourdain v. Wilson*, 4 B. & Ald. 266; not to exercise, or permit to be exercised, any offensive trade upon the premises; *Barron v. Richard*, 3 Edw. Ch. 96; to maintain a partition fence between the premises conveyed and other lands of the grantor; *Kellogg v. Robinson*, 6 Vt. 276. But a stipulation in a deed poll that the grantee, his heirs, and assigns, shall erect and perpetually maintain a fence between the granted premises and land adjoining, is not a covenant running with the land or otherwise. It is but a personal agreement of the grantee, made as part of the consideration of the grant, and evidenced by his acceptance of the deed, which may bind him and his legal representatives, but does not affect the estate. *Parish v. Whitney*, 3 Gray, 516; see *Plymouth v. Carver*, 16 Pick. 183; *Maule v. Weaver*, 7 Barr, 329; *Kimpton v. Eve*, 2 Ves. & B. 353; *Atlantic Dock Co. v. Leavitt*, 50 Barb. 135. Where the owners of adjoining lots agreed that one of them should build a party wall, and that the other should pay his proportion of the expense of erecting it as soon as he should build upon or dispose of it, and he afterwards sold his lot, subject to this payment; it was held that the covenant to pay was purely personal, and did not create a legal or equitable lien upon the land. *Curtis v. White*, 1 Clark, 389. A grant by a mortgagor of his equity of redemption with covenants of warranty, &c., is so far a conveyance of the land that the covenants real are annexed to it and pass with it to the grantee and his assigns. *White v. Whitney*, 3 Met. 81; *Tufts v. Adams*, 8 Pick. 547; *Kellogg v. Wood*, 4 Paige, 578. The covenant of warranty and quiet enjoyment runs with the land to the last purchaser even by a deed of re-

his heirs only; (b) and where the covenants run with the land, although they are entered into with the party, his executors and administrators, yet they will go to the heir with the land. (c) The right of action, even for a breach in the ancestor's lifetime, will descend to the heir, and not to the executor, where no actual damage was sustained by the ancestor. (d) A covenant may run with an incorporeal hereditament as well as a corporeal one. (e)

lease. *Brown v. Staples*, 28 Maine, 497; per *Edwards J.* in *Fowler v. Poling*, 6 Barb. 165, 166; *Beddoe v. Wadsworth*, 21 Wend. 120; see *De Chaumont v. Forsythe*, 2 Penn. 507. So it has been held that a covenant running with the land passes by a sheriff's sale to the purchaser; *McCrady v. Brisbane*, 1 Nott & McC. 104. So by an administrator's deed. *White v. Whitney*, 3 Met. 87; *Hodges v. Saunders*, 17 Pick. 470. A covenant real cannot be conveyed to the assignee of the land, unless the assignor has a capacity to convey the land itself to which the covenant is incident. *Randolph v. Kinney*, 3 Rand. 394. The word "assigns" is not necessary to convey the benefit of the covenant. *Masury v. Southworth*, 8 Ohio, 340; *Kennedy v. Scovil*, 12 Conn. 317; *Conover v. Smith*, 2 Green (N. J.), 51. Where a covenant running with the land is divisible in its nature, if the entire interest in different parcels of the land passes by assignment to separate individuals, the covenant will attach upon each parcel *pro tanto*. *Astor v. Miller*, 2 Paige, 68. As to the respective rights of a mortgagee and the purchaser of the equity of redemption in reference to a covenant running with the land, contained in the deed under which the mortgagor held the premises, see *White v. Whitney*, 3 Met. 81, 87, 88, per *Shaw C. J.* The assignee of an undivided moiety of leasehold premises can maintain an action in his own name, upon a covenant of warranty contained in the original lease. *Van Horne v. Crain*, 1 Paige, 455. The subject of covenants running with the land is very fully discussed in notes to *Spencer's case*, in 1 Smith

Lead. Cas. (5th Am. ed.) [22] 115 *et seq.* and notes; see 2 Cruise Dig. by Mr. Greenleaf, vol. 4, tit. 32, c. 26, § 23, and note; 4 Kent (11th ed.), 469-480; *Norman v. Wells*, 17 Wend. 136. Where land conveyed with covenants of warranty has passed by subsequent conveyances through the hands of various covenantees, the last covenantee, or assignee, in whose possession the land was when the covenant was broken, can alone sue for breach of covenant, and he has a right of action against any or all of the prior warrantors. No intermediate covenantee can sue his covenantor until he has himself been compelled to pay damages on his own account; and, until such damage has been paid by him, he cannot release such covenantor from his liability to the subsequent covenantees. *Chase v. Weston*, 12 N. H. 413; *Wheeler v. Sohler*, 3 Cush. 219; *Suydam v. Jones*, 10 Wend. 180; *Griffin v. Fairbrother*, 1 Fairf. 91; 4 Kent (11th ed.), 472, in note; *Brown v. Staples*, 28 Maine, 497; *Thomas v. Shattuck*, 2 Met. 615; *Claunch v. Allen*, 12 Ala. 159; *Crooker v. Jewell*, 29 Maine, 527; *Wyman v. Ballard*, 12 Mass. 304; *Booth v. Starr*, 1 Conn. 244; *Whitby v. Mumford*, 5 Cowen, 137; *Allen v. Little*, 36 Maine, 170.]

(b) *Co. Litt.* 384 *b*; 385 *a*; *Spencer's case*, 5 Rep. 16; *Bally v. Wells*, 3 Wils. 25; *Tatem v. Chaplin*, 2 H. Bl. 133.

(c) *Lougher v. Williams*, 2 Lev. 92.

(d) *Kingdon v. Nottle*, 1 Mau. & Sel. 355; *King v. Jones*, 5 Taunt. 418; 1 Mars. 107; 4 Mau. & Sel. 188; *Orme v. Broughton*, 10 Bing. 353.

(e) *Bally v. Wells*, Wilm. 349.

Therefore, where an owner in fee granted a right to dig for clay for a term of years, and the grantee covenanted to yield up the works in repair at the end of the term, an alienee of the fee was held entitled to sue upon the covenant.(f)

2. So covenant will lie by the devisee of lands in fee, though broken in the testator's lifetime. For the covenant passes with the land to the devisee, and is broken in the time of the devisee; for so long as the seller has not a good title there is a continuing breach. And it is not like a covenant to do an act of solitary performance, which not being done the covenant is broken once for all, but it is in the nature of a covenant to do a thing *toties quoties*, as the exigency of the case may require.(g)

(f) *Martyn v. Williams*, 1 H. & N. 817.

(g) *Kingdon v. Nottle*, 4 Mau. & Sel. 53; *Martyn v. Williams*, 1 H. & N. 817. [Mr. Justice Wilde, having noticed the decisions in *Kingdon v. Nottle*, reported in 1 M. & Sel. 355, and in 4 M. & Sel. 53, said: "It seems difficult to reconcile these decisions with the former authorities, and with the well known rule of the common law, that *choses in action* are not assignable; and they are certainly against the current of subsequent authorities." *Clark v. Swift*, 3 Met. 390, 393. And in *Mitchell v. Warner*, 5 Conn. 497, Hosmer C. J. referring to the case of *Kingdon v. Nottle*, said: "From the opinion in that case I am compelled to dissent *in omnibus*. First, I affirm that the novel idea attending the breach in the testator's lifetime, by calling it a continuing breach, and therefore a breach to the heir or devisee at a subsequent time, is an ingenious suggestion but of no substantial import. Every breach of a contract is a continuing breach, until it is in some manner healed; but the great question is, *to whom* does it continue as a breach? The only answer is, to the person who had title to the contract when it was broken. A second supposed breach is as futile as the imaginary unbroken existence of a thing dashed in pieces. It has no analogy to a covenant to do a future act at different times, which

may undergo repeated breaches." Mr. Chancellor Kent says: "The reason assigned for the decision in *Kingdon v. Nottle*, is too refined to be sound." 4 Kent (11th ed.), 472; see, also, *Townsend v. Morris*, 6 Cowen, 123; *Beddoe v. Wadsworth*, 21 Wend. 121; *Bickford v. Page*, 2 Mass. 455; *Bartholomew v. Candee*, 14 Pick. 167; *Thayer v. Clemence*, 22 Pick. 493; *Pike v. Galvin*, 29 Maine, 186, 187; *Whiting v. Dinsmore*, 6 Cush. 124; *Allen v. Greene*, 19 Ala. 34; *Collier v. Gamble*, 10 Missou. 467; *Martin v. Baker*, 5 Blackf. 232. The covenant of seisin in a deed does not run with the land. It is broken, if at all, as soon as the deed is made, and being a *chose in action*, does not pass with the land to the assignee. *Bickford v. Page*, 2 Mass. 455; *Prescott v. Trueman*, 4 Mass. 627; *Thayer v. Clemence*, 22 Pick. 493; *Clark v. Swift*, 3 Met. 390; *Slater v. Rawson*, 1 Met. 450; *Wheelock v. Thayer*, 16 Pick. 68; *Bartholomew v. Candee*, 14 Pick. 171; *Wyman v. Ballard*, 12 Mass. 305; *Baker v. Hunt*, 40 Ill. 264; *Wilson v. Cochran*, 48 Penn. St. 229; *Mitchell v. Warner*, 5 Conn. 497; *Davis v. Lyman*, 6 Conn. 249; *Greenby v. Wilcocks*, 2 John. 1; *Hamilton v. Wilson*, 4 John. 72; *Beddoe v. Wadsworth*, 21 Wend. 120; *McCarty v. Leggett*, 3 Hill, 134; *Townsend v. Morris*, 6 Cowen, 123; *Hacken v. Storer*, 8 Greenl. 228; *Heath v. Whidden*, 24 Maine, 383; *Potter v. Taylor*, 6 Vt. 676;

3. And covenants for title run with the land where a term of years only is assigned, in the same manner as when the fee is conveyed. (h) (1)

Garfield v. Williams, 2 Vt. 327; *Richardson v. Dorr*, 5 Vt. 9; *Pierce v. Johnson*, 4 Vt. 253; *Swasey v. Brooks*, 30 Vt. 692; *Pillsbury v. Mitchell*, 5 Wis. 7; *Stewart v. Drake*, 4 Halst. 139; *Chapman v. Holmes*, 5 Halst. 20; *Garrison v. Sandford*, 7 Halst. 261; *Carter v. Denman*, 3 Zabris. 270; *Logan v. Moulder*, 1 Pike, 313; *Ross v. Turner*, 2 Eng. 132; *Fowler v. Poling*, 2 Barb. 300; *Wilson v. Forbes*, 2 Dev. 30; *South v. Hoy*, 3 Monroe, 94; *Rice v. Spottiswood*, 6 Monroe, 40; *Grist v. Hodges*, 3 Dev. 200; 4 Kent (11th ed.), 471; *Pence v. Duval*, 9 B. Mon. 48; nor to the heir or devisee, *Hamilton v. Wilson*, 4 John. 72. So of the covenant that the grantor has good right to sell and convey, when he has no such right; which is said to be practically synonymous with the covenant of seisin. *Post*, 599; *Raymond v. Raymond*, 10 Cush. 134; *Chapman v. Holmes*, 5 Halst. 20; *Marston v. Hobbs*, 2 Mass. 443; *Bickford v. Page*, 2 Mass. 455; *Slater v. Rawson*, 1 Met. 450; *Rawle Cov.* (3d ed.) 105; *King v. Gilson*, 32 Ill. 348. But see further as to its being synonymous with the covenant of seisin; *Triplett v. Gill*, 7 J. J. Marsh. 436; *post*, 599, § 1, note, 601, § 7, note; *Rawle Cov.* (3d ed.) 105. A covenant against incumbrances does not run with the land. *Clark v. Swift*, 3 Met. 390; *Heath v. Whidden*, 24 Maine, 383; *Chapman v. Holmes*, 5 Halst. 20; *Stewart v. Drake*, 4 Halst. 139; *Mitchell v. Warner*, 5 Conn. 497; *Gilbert v. Bulkley*, 5 Conn. 262; *Davis v. Lyman*, 6 Conn. 249; *Cathcart v. Bowman*, 5 Barr, 317; *Shelton v. Pease*, 10 Missou. 473; *Angell Watercourses* (6th ed.), § 263; *Thayer v. Clemence*, 22 Pick. 494; *Whitney v. Dinsmore*, 6 Cush. 128; *Osborne v. Atkins*, 6 Gray, 424; *Rawle Cov.*

(3d ed.) 343-352; 4 Kent (11th ed.), 472; but see the cases of *Sprague v. Baker*, 17 Mass. 586; *Garrison v. Sandford*, 7 Halst. 261; *Martin v. Baker*, 5 Blackf. 232; *Foote v. Burnet*, 10 Ohio, 317. Where the grantor is not seised of the land at the time of conveying, his covenants of warranty do not attach to the land and run with it. *Slater v. Rawson*, 1 Met. 450; *Pike v. Galvin*, 29 Maine, 186; *Randolph v. Kinney*, 3 Rand. 394. But it has been held in some States that, if at the time of conveyance the grantor had a seisin in fact whether by right or by wrong, the covenant of seisin is satisfied, and an estate passes to the grantee, which will carry the covenants contained in the conveyance to any subsequent assignee. *Parsons C. J.* in *Marston v. Hobbs*, 2 Mass. 439; in *Twambly v. Henley*, 4 Mass. 442; in *Bearce v. Jackson*, 4 Mass. 410; *Slater v. Rawson*, 6 Met. 439, 444, 445; *Chapel v. Bull*, 17 Mass. 219; *Cornell v. Jackson*, 3 Cush. 509; *Raymond v. Raymond*, 10 Cush. 134. This doctrine, which seems to have originated in Massachusetts, has been adopted in some other States. See notes to *Spencer's case* in 1 Smith Lead. Cas. (5th Am. ed.) 156, 157; *Fowler v. Poling*, 6 Barb. 165; *Beddoe v. Wadsworth*, 21 Wend. 120; *Vancourt v. Moore*, 26 Missou. 92; *Collier v. Gambell*, 10 Missou. 472; *Barker v. M'Coy*, 3 Ohio, 218; *Foote v. Burnet*, 10 Ohio, 317; *Devore v. Sunderland*, 17 Ohio, 60; *Boothbay v. Hathaway*, 20 Maine, 251; *Willard v. Twitchell*, 1 N. H. 177; *Breck v. Young*,

(h) *Noke v. Awder*, Cro. Eliz. 436; *Lewis v. Campbell*, 8 Taunt. 715; 3 B. & Ald. 392. [But see *Allen v. Wooley*, 1 Blackf. 149.]

(1) It has been doubted whether a legal tenancy at will created by implication of law was assignable, and if so, whether the covenants ran with the land; *Murphy v. Ford*, 5 Ir. C. R. 19.

4. It was observed by a respectable writer, that *cestuis que use* are grantees within the statute 32 H. 8, c. 34, and are, therefore, entitled to the benefit of all covenants entered into by persons selling land for securing the title to such lands.⁽ⁱ⁾ And this is sanctioned by some of the early cases, in which, although the right to the covenants depended upon the common law, the court, with some want of *precision, said the plaintiff was entitled either by the common law or by the statute.^(k) And the statute itself was so framed as to lead to erroneous views. But covenants for title run with the land in the hands of alienees, who may maintain actions upon them as assignees by the common law, and this is expressly laid down without reference to the statute of 32 Hen. 8 in Roll's statement of *Middlemore v. Goodale*.^(l) And the statute relates only to covenants which are a charge upon or incident to reversions.

5. Where a seisin is raised to serve the uses, as upon a conveyance to A. and his heirs to the usual uses to bar dower in favor of A. or of B., including a power of appointment, the covenants should be entered into with A. and his heirs, and they will run with the land into whose hands soever it may come, whether by appointment or otherwise. The statute of uses will

11 N. H. 491; *Kirkendall v. Mitchell*, 3 McLean, 145; *Cushman v. Blanchard*, 2 Greenl. 268, 269; *Baxter v. Bradbury*, 20 Maine, 260; *Rawle Cov.* (3d ed.) 20-47; *Wilson v. Wedenham*, 51 Maine, 566. By the law of Missouri, a person conveying land of which at the time he has no seisin, has power to make a covenant of warranty which will run with the land. *Vancourt v. Moore*, 26 Missou. 92. So in Maine, by statute, covenants of seisin, and against incumbrances pass to the assignee of the grantee, and he may maintain an action for their breach in his own name against the grantor provided he will release the grantee from his covenants. *Allen v. Little*, 36 Maine, 170, 175; *Prescott v. Hobbs*, 30 Maine, 345; *Stowell v. Bennett*, 34 Maine, 422. But the doctrine that a grantor, having an actual seisin though without lawful title, may make a conveyance valid to satisfy the covenant of seisin, has been controverted in other cases. The

contrary was decided in *Parker v. Brown*, 15 N. H. 176; *Partridge v. Hatch*, 18 N. H. 494; see *Gilbert v. Bulkley*, 5 Conn. 262; *Lockwood v. Sturdevant*, 6 Conn. 385; *Comstock v. Comstock*, 23 Conn. 349; 4 Kent (11th ed.), 471, note (c); *Catlin v. Hurlburt*, 3 Vt. 407; *Richardson v. Dorr*, 5 Vt. 21; *Mills v. Catlin*, 22 Vt. 106; *Rawle Cov.* (3d ed.) 26 *et seq.* As to covenants that the grantor is "seised of an indefeasible estate," see *Rawle Cov.* (3d ed.) 22, 23; *Prescott v. Trueman*, 4 Mass. 631; *Smith v. Strong*, 14 Pick. 132; *Raymond v. Raymond*, 10 Cush. 134; *Pierce v. Johnson*, 4 Vt. 53; *Collier v. Gamble*, 10 Missou. 472; *Abbott v. Allen*, 14 John. 252; *post*, 60.]

(i) 4 Cruise Dig. p. 80, s. 44.

(k) Cro. Car. 222, 503; *Ld. Portmore v. Bunn*, 1 B. & C. 694; *qu.* whether that could be within the 32 H. 8.

(l) 1 Ro. Ab. 521, pl. 6.

of course turn the uses into possessions, and the *cestuis que use* will then be deemed assignees, and may take advantage of the covenants by force of the common law, just as if the statute had not been passed, and the estate had been conveyed to them directly; and whether the estate is conveyed or the use is appointed, no person can obtain the legal estate without its being served out of the seisin of A. and his' heirs, and with the legal seisin executed by the statute the benefit of the covenants will run. And so with reference to subsequent conveyances, it is unimportant whether the owner of the land claims under a release or an appointment, for the covenants having once become attached to the land, will continue to run with it.⁽¹⁾

6. If in such a conveyance to A. and his heirs to uses to bar dower in favor of B., including a power of appointment, the covenants are entered into with B. and his heirs, and B. appoint the estate to C., the covenants will not run with the land in the hands of C., because B.'s estate is divested and not transferred to C., and C. has no estate to which the covenants were ever annexed. This is the principle established by *Roach v. Wadham*. The distinction between this and the preceding case is an obvious one: in the former case, each estate takes effect out of the original seisin, and the covenants run with it; but in the case now put, the estate to C. takes effect out of the original seisin, and defeats the fee vested in B. and the covenants annexed to it, instead of being derived out of or through that estate. But a covenant with *cestui que use*, who takes the legal estate by force of the statute, will run with that estate in the hands of an alienee. If, therefore, in a conveyance to A. and his heirs to the use of B. and his heirs, the covenants for title are entered into with B. and his heirs, they will pass with his estate in every stage of its devolution or transfer. So if the conveyance were to A. and his heirs to uses to *bar dower in favor of B., including a power of appointment, and the covenants were entered into with B. and his heirs, and B. were to convey the fee by force of his estate, and not appoint it under his power, the covenants would go with the fee.

7. This is otherwise laid down by the real property commis-

⁽¹⁾ [*Ante*, 577, note a; *Brown v. Staples*, 28 Maine, 497.]

sioners,^(m) who observe that conveyancers usually settle conveyances where dower is to be barred so as to place the seisin in the purchaser himself, and then they make him the covenantee. But where (as frequently happens) this is not done, and the fee is conveyed to a releasee to uses, and the covenants are entered into with the purchaser, being merely *cestui que use*, the covenants become covenants in gross and separated from the land. They think this should be remedied. But there appears to be no foundation for this opinion, and no remedy is required. If the court of king's bench had not assumed the law to be the other way, it would have been idle to have argued the case of *Roach v. Wadham*. The purchaser takes the legal estate the instant after the execution of the deed, and out of a seisin raised by the deed, and there is no objection in point of law to the covenants for title in the deed knitting themselves unto that legal estate; and it has been ruled that where the covenants for title are entered into preparatory to the vesting of the estate — as in the case of copyholds, where the covenant to surrender and the covenants for title precede the surrender, or in the case of freeholds, where a deed of feoffment is executed on one day with covenants for title, and the livery of seisin is not made until a subsequent day — the covenants will run with the land, for the whole is in law but one assurance.⁽ⁿ⁾

8. Where no seisin is created by a conveyance, but the use is appointed under a power, as where under an existing power the fee is appointed to A., he will, as we have seen, take the benefit of covenants running with the land under previous conveyances, and any covenants entered into *with himself for title*, will equally run with the land, for he takes the use which the statute executes into a legal estate out of the original seisin, and with that estate the covenants entered into with him may well run.

9. It is supposed by some that such covenants are merely collateral for want of legal privity, but the purchaser takes the legal fee by the act of the seller — the seller, therefore, cannot be deemed a stranger, if that would be deemed an objection to the covenants attaching — and it is indifferent to this question out of what seisin the use to the purchaser is served, as it becomes a legal estate in his hands, with which the covenants entered into with him in respect of that estate may run. I am not aware of

(m) Third Rep. p. 52.

(n) Riddell v. Riddell, 7 Sim. 529.

even a plausible argument against this view. The real property commissioners, in adverting to the operation of the statute of uses, observe, that thus * persons claiming under the exercise of powers become entitled to the benefit of covenants which run with the land. But they add, that doubts appearing to exist on this point, they think it expedient that the law should be settled by legislative declaration.(o) I am not aware that such doubts are generally entertained, and certainly some foundation for them should be stated before the legislature take any step.

10. But again, if under a power of appointment in A. a new power of appointment be created in B., with whom A. covenants for title in the usual way, and B. afterwards executes his power in favor of C., the covenants will not run with the land in his hands for the reason before given.

11. It will be collected from what has already been said, that if a purchaser enter into a covenant which runs with the land, and there is a privity of estate at the time of the covenant, yet if a subsequent purchaser do not take the estate of the original purchaser, he will not be bound by the covenant. It seems difficult to conceive that this case can exist. It occurred, however, in the case of *Roach v. Wadham*; (p) an estate was conveyed to A., his heirs and assigns, to such uses as B., the purchaser, should appoint; and in default of appointment, to the purchaser in fee, yielding and paying to the vendors, their heirs and assigns, a perpetual fee-farm rent, which rent the purchaser, for himself, his heirs and *assigns*, covenanted to pay; the estate was afterwards vested in another purchaser; and as it was holden that the last purchaser was in *under the power*, and not by virtue of the first purchaser's estate, it was admitted, on all hands, that an action brought against him by the original vendor, for the fee-farm rent, was not maintainable, for he had not the estate of the first purchaser, but took as if the original conveyance had been made to himself.

12. There, however, as we have seen, the purchaser who entered into the covenant took the use but not the legal seisin, that is, the estate was conveyed to another and his heirs to serve the uses. But suppose the conveyance had been made to the purchaser himself and his heirs, to the use that the seller and his

(o) Third Rep. p. 52.

(p) 6 East, 289.

heirs should receive a rentcharge with the usual powers of distress and entry, and subject thereto to uses to bar dower, and the purchaser thus having the legal seisin, had covenanted with the seller, his heirs and assigns, to pay the annuity (assuming that such a covenant can run with the land) would the covenant have continued to run with the land whether the purchaser had transferred the fee to another by a conveyance of the estate, or by an appointment of the use? In either case the alienee would equally have claimed under the original seisin; and as a covenant *with* a person in whom the seisin is vested, will be *transferred with that seisin, so it may be thought that a covenant *by* a person in whom the seisin is vested, will bind those to whom the seisin is transferred. (q)

13. The difficulty in the way of the covenant attaching in the case supposed, is, that if it run with the seisin it might to the extent of his interest be held to bind the seller himself as grantee of the rentcharge, and thus he would be bound to perform the very covenant of which he claims the performance by another. It would not be safe to rely upon the covenant running with the land in such a case, if the power should be exercised, and therefore in every such case, and clearly where no seisin can be created in the purchaser, — for example, where the seller has only a power of appointment, and the purchaser is to enter into a covenant which it is intended shall run with the land, — the vendor ought to insist upon the purchaser taking a conveyance in fee, and should not permit the estate to be limited to the usual uses to bar dower. It will not often happen that any objection will be made to this suggestion, as the new law of dower, where it operates, places the right of dower in the husband's power, although the legal fee is vested in him.

14. The proposition before stated, that it is not sufficient that a covenant is concerning the land, but, in order to make it run with the land, there must be a privity of estate between the covenanting parties, (q¹) leads to the consideration of the ques-

(q) See Cornish on Purchase Deeds, 50; 7 Jarm. Convey. 511, n.

(q¹) [4 Kent (11th ed.), 472, 473. It is necessary to the creation and existence of a real covenant, that there should be a privity of estate between the parties, and

such covenants are usually contained in the deed of conveyance itself. *Ross v. Turner*, 2 Eng. 132; *Morse v. Aldrich*, 19 Pick. 453, 454; *Demarest v. Willard*, 8 Cowen, 206; *Angell Watercourses*, (6th ed.) § 257. As to this point of privity of

tion whether it applies as well to covenants entered into by a vendor, as to covenants entered into by a purchaser. If it do, the consequences of this doctrine are truly alarming. In a great proportion of cases, the vendor has either mortgaged the estate in fee, or is a mere *cestui que trust*; and if his covenants were to be deemed covenants in gross, the assignees of the land could only compel performance of the covenants by the circuitous mode of using the name of the first purchaser or his representatives, whom at the distance of some years it might be very difficult to trace.(q²)

15. It seems impossible to get over the objection, by the *form* of the covenant; for although the vendor covenant with the purchaser, his heirs and assigns, yet the assignee of the lands will not be entitled to the benefit of the covenant, unless it run with the land under the general rule of law.(r) The only mode by which the difficulty can be avoided is, to require the vendor to take a conveyance to himself in fee, or to the usual uses to bar dower, previously to executing a conveyance to the purchaser; and this, I believe, has been sometimes done since the point was first suggested in this work.

16. In considering in what cases covenants run with the land, as between vendors and purchasers, some difficulty has arisen from the * sense in which the term *privity of estate* is used, and perhaps from these cases having been sometimes confounded with those arising upon covenants in leases.(s)(1) As covenants

estate, see *Taylor v. Owen*, 2 Blackf. 301; *Plymouth v. Carver*, 16 Pick. 183; & notes.

Hurd v. Curtis, 19 Pick. 462; 4 Kent (11th ed.), 472, 473; *Allen v. Wooley*, 1 Blackf. 149; *Brewer v. Marshall*, 3 C. C. Green (N. J.), 337.] (r) *Tempest's* case, Clayt. 60; *Palm.* 558; *Roach v. Wadham*, *ubi sup.*

(s) *Walker's case*, 3 Rep. 23 a; 5 H. 7, 18 b, pl. 12.

(q²) [See *Spencer's case* in 1 Smith

(1) "There are three manners of privities, — viz. 1. Privity in case of estate only. 2. Privity in respect of contract only. 3. Privity in respect of estate and contract together. The first, viz. privity of estate only, as between the grantee of the lessor's reversion and the lessee, or between the lessor and the assignee of the lessee, for no contract was made between them. The second, viz. privity in respect of contract only, which is personal privity, and extends only to the person of the lessor and the person of the lessee, as between the lessor and the lessee, *after* the latter has assigned over, for the privity of contract remains, although the privity of estate is destroyed; and yet this is between the lessor and lessee only, for in the very case, viz. an assign-

respecting the land *ran with the land*, the assignee of the lessee was bound by the covenants of the lessee, and was entitled to take advantage of them, and this in respect of privity of estate; and this operation does not depend upon the 32 H. 8, c. 34, s. 2, although the act affects to create it, probably to give to the statute the appearance of providing for the rights of tenants as well as of landlords. The act in its preamble expressly states, that by the common law no stranger to any covenant, action, or condition, shall take any advantage or benefit of the same, but only such as be parties or privies thereunto; and the act then proceeds to give to grantees of reversions the same right to take advantage of covenants and conditions as the grantors had, and to give corresponding rights to lessees. This recital still leaves it open to be ascertained who are parties or privies thereunto. The great object was to enable grantees of reversions to take advantage of conditions, but a grantee of a reversion was not prevented from taking advantage of a condition broken for want of privity, but because by his entry he would defeat his reversion granted to him, for by the entry the reversion would be determined, which was deemed repugnant and contrary to the acceptance of the reversion.^(t)

17. And it is said that an assignee of a reversion might at common law have maintained an action of covenant for anything agreed to be done upon the land itself; ^(u) and Coke was

(t) 5 H. 7, 18 b, pl. 12; Co. Litt. 214 a, 215 a; Magnay v. Edwards, 13 C. B. 479.

Whilst in practice as a conveyancer, I thought the mode of reservation of rent in this case the proper one.

(u) Barker v. Damer, 3 Mod. 338; Way v. Yally, 6 Mod. 194. [But it is not necessary that the act, in respect to which the covenant is made, should be done on

the premises demised. Norman v. Wells, 17 Wend. 136. It must, however, be touching or concerning the thing demised as affecting the value of the reversion or the term, or influencing the rent. Norman v. Wells, 17 Wend. 136. A covenant by the vendor of waste land that neither he nor his assigns will sell any more from the adjoining land, is not of a

ment by the lessee, there is no privity of contract between the lessor and the assignee, but there is a privity of estate between them. The third, viz. privity in respect of contract and estate together, as between the lessor and the lessee himself. At common law *debt* might be maintained by the alienee of the lessor for the rent against not only the lessee, but the assignee of the lessee, although it was objected that there was a want of privity; but whenever the reversion comes legally to any one, as he shall have the rent, he shall have an action of debt, because the law creates privity as the law gives the rent to him, 5 H. 7, 18 b, pl. 12."

of opinion that an assignee of the reversion could maintain an action of covenant for the rent at common law, for the rent goes with the reversion, and so by *consequence the covenant also: (x) and in a modern case, where the assignee of the reversion brought covenant against the personal representative of the lessee upon a demise of land for years, doing suit to the mill of the lessor, his heirs and assigns, by grinding all such corn there as should grow upon the land demised, which was held to amount to an implied covenant which ran with the land, Mr. Justice Bayley said, that an action at the suit of the assignee of the reversion was maintainable in some cases at common law, in others under the statute 32 H. 8; he rather thought this case belonged to the former class. (y) But speaking generally, we may observe that at common law the action of covenant did not lie for the assignee of the reversion. (z) The statute did not, it is said, transfer any privity of contract to the assignee, but the intent of it was to annex to the reversion such covenants only which concerned the land itself, as to repair the house and amend the fences (and not to annex or transfer any collateral covenants, as to pay a sum of money), for that is fixed by the common law to the reversion. (a) But in truth, although the statute did not transfer any privity of contract depending upon personal covenants, yet it did transfer privity of contract depending upon estate. For by the grant of the reversion, the privity of contract for the benefit of the grantee was destroyed, but it was restored by the statute; and as it was restored only as regarded covenants pertaining to the land, and only as between reversioner and tenant, the decision in *Webb v. Russell*, (b) that there must be a privity of estate between the parties, was unavoidable, because it was only where there was a privity of

character to run with the title. *Brewer v. Marshall*, 4 C. E. Green (N. J.), 537, several judges dissenting.

(x) *Athowe v. Heming*, 1 Ro. R. 81, L'autres Justices rient disont al cest point. [When real estate is conveyed, all the rents and income, which have accumulated, and which have not been so disconnected with it, as to become personal property, will pass by the conveyance. *Winslow v. Rand*, 29 Maine, 362.]

(y) *Vyvyan v. Arthur*, 1 B. & C. 410. [See *Hurd v. Curtis*, 19 Pick. 463, 464; *Winslow v. Rand*, 29 Maine, 362.]

(z) *Barker v. Damer*, *ubi sup.*; *Thrale v. Cornwall*, 1 Wils. 165.

(a) 3 Mod. 338; *Spenser's case*, 5 Rep. 16; *Williams v. Burrell*, 1 Man. & Gra. N. S. 402; *Martyn v. Clue*, 18 Q. B. 661.

(b) *Inf.* pl. 18.

estate that the statute gave to the reversioner the benefit of the covenants. Before the statute, and by the common law, debt would lie for the rent by the reversioner upon the privity of estate. The statute passes the covenant without altering its nature, but it is assignable [or rather is transferred] solely as a contract.^(c)

18. Lord Kenyon seems to have decided in *Webb v. Russell*, that there must be a privity of estate between the covenanting parties to make a covenant run with the land.^(d) And although there the question arose upon a lease, that does not distinguish it from other cases. For the grant of a lease does not make all the covenants in it run with the land, nor is that operation effected by the statute of Hen. 8; but if the covenants from their own nature would run with *the land, then there is a privity of estate to support them as such, and the statute gives the benefit of them to assignees of the reversion. What Lord Kenyon therefore decided was this, that a lessee could not make covenants entered into by him with a stranger run with the land, although by their nature they properly would run with it; for there was no question about their running with the reversion, as there was none vested in the covenantee, who was a mortgagor without any estate, the legal reversion upon the lease being vested in the mortgagee, by whom, in conjunction with the mortgagor, the lease was granted. The rule therefore denies to a lessee the power to charge the assignee of the lands with covenants entered into with a stranger, however directly relating to the lands.

19. The same rule would seem to apply to a purchaser entering into covenants with the seller; therefore if the estate was at the time of the conveyance mortgaged in fee, and the purchaser were to enter into a covenant respecting the land with the seller, the covenant would not bind the assignees of the land, but would be a mere covenant in gross, for the vendor would, in contemplation of law, like the mortgagor in *Webb v. Russell*, be a mere stranger, and consequently there would be no privity of estate between him and the purchaser.⁽¹⁾

(c) *Thursby v. Plant*, 1 Lev. 259; 1 *Ib.* 678; 1 H. Bl. 362; 3 B. & Ad. 591; Saund. 237. *Magnay v. Edwards*, 17 Jur. 839. [See

(d) 3 T. R. 395; *Stokes v. Russell*, *Hurd v. Curtis*, 19 Pick. 463.]

(1) Wilmot, C. J., in delivering the opinion of the court in *Bally v. Wells*, Wilm.

20. And now by statute where the reversion expectant upon a lease shall, after the 1st October, 1845, be surrendered or merged, the estate which shall for the time being confer, as against the tenant under the same lease, the next vested right, shall, to the extent and for the purpose of preserving such incidents to and obligations on the same reversion as but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant upon the same lease.(e)

21. In some cases, too much stress has been laid on the case of lessor and lessee, as if no covenants could run with the land where there was not a reversion.(f)

* 22. These observations may perhaps enable us to understand more readily the doctrine of covenants for title running with the land, and they show to what remedies a purchaser of an estate in lease is entitled against a lessee, and such a purchaser is entitled to the benefit of covenants entered into by a lessee with the vendor, although the estate is vested in him by way of use under the statute of uses, because this last statute puts him in the place of his feoffee.(g)

23. Lord Brougham C. in delivering judgment in *Keppel v. Bailey*,(h) observed, with reference to *Tatem v. Chaplin*, 2 H. Blackst. 133, in which it was decided, that a covenant by the

(e) 8 & 9 Vict. c. 106, s. 9; see 7 & 8 Vict. c. 76, s. 9.

(f) 2 My. & Ke. 534.

(g) *Lee v. Arnold*, 4 Lev. 27; *Moo. 79 nom.*; *Appowel v. Monnoux*; *Roll v. Os-*

borne, *Moo. 859*; 8 & 9 Vict. c. 106, s. 9; 7 & 8 Vict. c. 76, s. 9, as to non-effect of surrender or merger of reversion.

(h) 2 My. & Ke. 542; see *Ackroyd v. Smith*, 9 C. B. 689, 10 C. B. 164.

345, classed together the cases of covenants in leases and covenants with the owner of the fee, where there was no particular estate with a reversion. In explaining where covenants bind an assignee, he observes, assignees of leases become liable to assignees of the reversion, and assignees of reversions become liable to assignees of leases, as where lessors covenant to repair, to renew, reversions are bound. Covenants between partners [parceners] to acquit of suit run with the land; to perform divine service within a manor with the lord of that manor and his heirs, follows the manor into whose hands soever it comes, whether by descent or purchase. Covenants, he adds, which run and rest with land, lie for or against assignee at the common law, though not named. [See *Morse v. Aldrich*, 19 Pick. 453; *Masury v. Southworth*, 8 Ohio, 340; *Kennedy v. Scovil*, 12 Conn. 317.] Upon a joint covenant in a lease, where the covenant from its nature would run with the land, it has been held to be sufficient if there is privity of estate between one of the covenantees and the assignee of the lease. See *Wakefield v. Brown*, 9 Q. B. 209; *Haig v. Hogan*, 4 Bligh N. S. 380; *Sugd. H. L. Cas. 540*; [*Hurd v. Curtis*, 19 Pick. 462; *Morse v. Aldrich*, 19 Pick. 449, 453.]

lessee to reside in the demised premises bound the assignee not named, "Suppose there had been no demise and no privity by the reversion, could a covenant to reside in a given messuage bind assignees of a purchaser and be sued upon by the seller of the messuage? In other words, can a man by a covenant with a seller of a house, bind all who may ever live in that house after he shall have sold it, and his vendees sold it over and over again, to reside constantly in it?" The question, the learned judge added, answers itself, but it also marks the distinction between such cases and that of *Keppel v. Bailey*.

24. Now, this is an opinion, that, even where there is a sufficient privity of estate to make covenants relating to the land entered into by a seller run with the land in the hands of a purchaser and his assignees, covenants by the purchaser relating to the land will not bind his assignees, that is, they may take the benefit but cannot be charged with the obligation of covenants. But this opinion must depend upon the previous authorities, which we shall presently consider.

25. The real property commissioners, in their third report,⁽ⁱ⁾ observe, that expressions found in some books would lead to the opinion, that in considering this class of covenants with reference to the *benefit* of them, there is a distinction between those cases where the covenantor is a party by whom the estate is or has been conveyed, and those in which he is a stranger to the estate. They say, they think the authority of Lord Coke on this point (which is express),^(k) sufficient to warrant them in disregarding this distinction, but as the doubt seemed to have prevailed extensively, it might be proper it should be negated by legislative declaration, and they recommend that privity of estate should not be necessary to make a *covenant run with the land for the benefit of every person taking the land or any interest in it.

26. It must not be supposed, from the statement of the commissioners, that Coke expressly states that a covenant entered into by a stranger will run with the land. Coke, in discussing warranties, refers to covenants annexed to the land, and which

(i) P. 52; see 7 Jarm. Con. 572, n. and (k) Co. Litt. 324 b; the correct reference is 384 b.
Cases.

are to yield but damages; he gives two examples, both from the Year Books, one where the assignee of the land shall take advantage of a covenant entered into upon a partition by one coparcener, with the other, because, although a stranger to the covenant, it ran with the land. Of course *this* is no authority against the position. The other is the case of a covenant by a prior, with the assent of his convent, to celebrate divine service for the lord of the manor and his servants, &c., in the chapel of the covenantee, which was parcel of a manor belonging to the same person; and in this case it is said, that the assignees shall have an action of covenant, although they are not named, for that the remedy by covenant doth run with the land to give damages to the party grieved, and was in a manner appurtenant to the manor. But if the covenant had been with a stranger to celebrate divine service in the chapel of A. and his heirs, there the assignee should not have an action of covenant, for the covenant could not be annexed to the manor, because the covenantee was not seised of the manor. Upon reference to the Year Book (l) it appears that the point was not decided, but is merely a dictum by Finchden, who puts the right to sue on the fact that the plaintiff was owner of the manor where the chapel is, and the service was to be performed in the chapel. The distinction is clearly taken in Co. Litt., between the cases where the covenantee has the land and those where he has not, but nothing is said as to the covenantor not having an interest in the chapel or the manor. The case is cited by Coke as an authority for the covenant running with the land, where it is entered into with the lord of the manor, and he states that it would be otherwise if the covenant was with a stranger, and therefore, assuming that there is no connection between the prior and convent and the manor, it seems to show that Coke considered that the covenantor need not have an interest in the land, but that the covenantee must; and yet, as we shall see, a covenant by the prior to sing with the owner of the chapel, would not run with the land, nor does Coke say it would, and therefore in early times — the case of the prior was in 42 E. 3 — it seemed to be the opinion, that where a chapel was annexed to a manor, so that the

(l) Pakenham's case, 42 E. iii. 3, pl. 14; Bro. Ab. Covenant, pl. 5; Martyn v. Williams, 1 H. & N. 817.

lord had an interest in it as lay property, and the church had an interest in it in spirituals, this common interest would attach a covenant to perform service in the chapel to the * manor to which the chapel was appendant, so as to be transmitted with it whilst they remained unsevered. The case stands alone, but the grounds upon which it depends have never been explained.(1)

27. There appears to be no direct authority that a stranger to the land can enter into covenants respecting it, which will run with the land in the hands of assignees. Lord Kenyon drew no

(1) The writ of covenant was brought by the plaintiff *as heir*: the first objection was, that neither the plaintiff nor his servants were living in the manor, but the prior's counsel did not, the report states, dare to demur, but pleaded that the plaintiff was not heir, he having an elder brother. To this it was answered, that the plaintiff was entitled to the manor as a purchaser under a settlement, and as such was entitled to maintain the action. Belknap, the defendant's counsel, still insisting that none but the heir could recover, and that the plaintiff had sued as heir, Finchden J. put the case of the coparceners stated by Coke, to which Belknap replied, that he granted it was so in that case, because the acquittance lay upon the land and not upon the person, whilst here the covenant was personal; but Finchden said, if he conceded that that was law, it was much stronger in the other case, for in the case which he had mentioned the action was maintained because he was tenant of the land of which the suit was due, and so it was here: he was tenant of the manor where the chapel is, and in the chapel it ought to be performed. Wichingham J. put the case of a grant of warren by the king to one who was tenant of the manor; the warren would not pass by his alienation of the manor, because it is not appendant to the manor, nor did it seem more so here from the time that the services were not appurtenant to the manor [which opinion would seem to prove that neither the heir nor the alienee could maintain the action]. Thorp J., addressing Belknap, said, there are some covenants for which no man shall have an action except the party to the covenant or his heirs; and some covenants have inheritance in the land ["the inhabitants of the land, as well as every one who has the land, shall have covenant;" Fitz. Ab. Covenant, pl. 17]; so that whoever has the land by alienation or in other manner, shall have an action of covenant, and when you say that the plaintiff is not heir, he is privy in blood and may be heir [which is a bad argument], and also he is tenant of the land, and it is a thing which is annexed to the chapel, which is within the manor, and so annexed to the manor; and he also relied upon a count by the plaintiff, that the services had been performed in all times beyond memory, wherefore there was reason that this action should be maintained; but it was adjourned, and there is no further trace of it. In a later case (Horne's case, 2 H. 4, 6, pl. 25, in the Year Books), where the covenant was brought by the heir, and the chapel was not said to be annexed to the manor, it was said that no one could bring the action unless he was privy to the covenant as heir, and Broke was of opinion that, if the covenant had been to perform divine service in the chapel of the manor, which would vest the inheritance in the manor, yet if the lord aliened the manor, the heir should not have covenant; and as it seemed, the alienee should not have covenant, for he was not privy in blood. Bro. Ab. Covenant, pl. 15, Coker v. Guy, 2 Bos. & Pul. 565, 568, n.

distinction in laying down the rule in *Webb v. Russell*,^(m) which decision excited a great deal of feeling at Westminster.⁽ⁿ⁾

28. Coke's position, that if the covenant had been with a stranger, the assignee should not have an action of covenant, is of course correct, but the reason he gives for it, that the covenant cannot be annexed to the manor, because the covenantee was not seised of the manor, shows that the rule was considered to apply only where there was a manor to which the chapel was appendant. The point was not decided by Henry Horne's case, to which reference is made in the Year Books. * There the manor and the chapel, which was within it, were vested in the person with whom the covenant was made to perform divine service, but the action was brought by the plaintiff as heir of the covenantee, and the manor and chapel had been aliened; and although they have been vested in the plaintiff as a purchaser, yet he had transferred them, and they were then vested in his wife in fee, so that he had no interest in either except in her right, and she was not named in the writ. The deed of covenant did not mention that the chapel was within the manor, and it was held that the heir could in that character maintain the action. This is the substance of the report in the Year Book, which is more intelligible than the statement in Fitzherbert; ^(o) and so observe, says Broke in his Abridgement, that a personal action may descend to the heir, and a purchaser shall not have an action of covenant; yet Broke adds, it seems by Markham, that if the covenant had been to perform divine service in the chapel of the manor, that vests the inheritance in the manor [or, as it is stated in the Year Books, if the covenant had been to the lord of the manor, who had the inheritance in the manor, it would be otherwise]. Yet it should seem, Broke concludes there, that if the lord aliens his manor, the heir shall not have covenant, and as it seems the alienee shall not have covenant, for he is not privy in blood.

29. The case is a clear authority that a covenant entered into by a stranger, *e. g.* by a prior, to perform divine service in a man's chapel, does not go with the chapel so that the assignee of

^(m) 3 T. R. 393.

^(o) Fitz. Ab. Covenant, pl. 13.

⁽ⁿ⁾ Per Ld. Tenterden, 3 B. & Ad.

the chapel may sue upon it, but descends to the heir, who may sue upon it although the chapel do not descend to him. The report expressly states that none can have an action if not he who is privy to the covenant as heir.

30. In a case a few years afterwards,(p) where a parson, with the consent of the ordinary, had covenanted to perform divine service in the covenantee's house during his life, it was pleaded in bar of the action, that the plaintiff, who was tenant by the curtesy, had by surrender and demise become tenant for years only of the house, and so he was in of another estate; but it was held that the covenant was not extinct, but was an executory matter between them, and *lies in privity by way of action, although another has the house.*

31. In a recent case,(q) the court, in referring to Pakenham's case, asked whether it could now be maintained that a covenant by the *purchaser of a messuage* within a manor, to exercise any trade then beneficial to the lord or his tenant, as continually to keep school, or continually to have a blacksmith's shop, could be sued upon by a *purchaser of the manor*; *nay more, that such a covenant would run with the land though made, as in Pakenham's case, by a party or corporation * not a purchaser of the messuage*; nay, that the lord, or his vendee of the manor, could sue any one who might at any distance of time become, by purchase from the covenantor, owner of the messuage, for not exercising therein the stipulated trade. It has been laid down by the court of common pleas, that it is not in the power of a vendor to create any rights not connected with the use or enjoyment of the land, and annex them to it, nor can the owner of land render it subject to a new species of burden, so as to bind it in the hands of an assignee.(r)

32. In *King v. Jones*,(s) where a woman, whilst sole, mortgaged her estate in fee, and then married, and the mortgagee, by the direction of her and her husband, conveyed to a purchaser in fee, and the husband covenanted for further assurance, and the covenant was broken, it was admitted that this was a covenant

(p) 6 H. 4, 1, pl. 5.

(q) *Keppell v. Bailey*, 2 My. & Ke. 539, 540; *post.*

(r) *Ackroyd v. Smith*, 9 C. B. 689, 10

C. B. 164; *Egerton v. Earl Brownlow*, 4 H. L. Cas. 1.

(s) 5 Taunt. 418.

which ran with the land; and yet, it will be observed, that the covenant was entered into by a person having no legal interest in the estate; but there had been no alienation — the estate descended to the heir, and he maintained the action.

33. In a case, where in a lease of land the lessor reserved suit to his mill, it was held, that there was an implied covenant to do such suit, which ran with the land as long as the land and the mill remained in the same person; (t) Mr. Justice Bayley observed, that in the case in the 42 Edward 3, the prior and his successors took no interest in the land, yet the covenant to sing in the chapel was held to run with the land. In the case before him the covenantor was tenant of land to the covenantee, and the suit to be done to the mill was in respect of the land demised. Mr. Justice Holroyd said, that the case from the Year Books seemed to him to govern the present, and was much stronger.(1)

(t) *Vyvyan v. Arthur*, 1 B. & C. 410; 2 My. & Ke. 541; 10 B. & C. 857; *Vernon v. Smith*, 5 B. & Ald. 10, 11; *Ld. Ex-bridge v. Staniland*, 1 Ves. 56. [There is no difference between express and implied covenants as to their running with the land. *Taylor L. & T.* §§ 261, 262; *Angell Watercourses* (6th ed.), § 256.

(1) A covenant by a lessor to supply the houses demised with good water was held to run with the land, although water brought on the land in buckets would satisfy the covenant; *Jourdain v. Wilson*, 4 B. & Ald. 266. And a covenant to renew (*Doe v. Hayley*, 12 East, 469), or to obtain a renewal from the superior landlord (*Simpson v. Clayton*, 4 Bing. N. C. 758), runs with the land; and yet a covenant by a lessee of a public-house to buy all his beer of the lessor appears to be considered one which would not run with the land (*Hartley v. Pehall*, Peake, 131; *Doe v. Reid*, 10 B. & C. 849; see 2 My. & Ke.); and where a lessee covenanted to leave all the trees he should plant during the term, and the lessor covenanted for himself, his executors, and administrators, to pay for the trees at a fair valuation by two persons, one to be named by each party, their executors, administrators, or assigns, and the lessor's assignees refused to name an arbitrator, it was held that the covenant to refer to arbitration did not run with the land, and therefore the assignees were not bound by it, the assignees not being named (*Gray v. Cuthbertson*, 1 Selw. N. P. 485); and yet the trees were part of the inheritance, and the naming of an arbitrator was merely a mode of executing the obligation to pay for them. A covenant by a lessor in an underlease not naming assignees to pay the rent, &c., and perform or indemnify the lessee from the proviso, covenants, &c., in the original lease was held not to run with the land so as to bind the assignee of the original lease; which lease contained a covenant to build which had not been performed, and a power of reëntury in case of default in the performance of the covenants, *Doughty v. Bowman*, 11 Q. B. 444. The proposition in *Spencer's case* (5 Rep. 16 a), that a covenant which would run with the land if the assignees were named, does not where he is not named, and the thing was not *in esse* at the time of the making the covenant, was considered by the court, in *Minshull v. Oakes*,

* 34. In another case, the court of king's bench appears to have held, that a covenant could not run with the land unless the conveyance of it was actually made by the covenantor. I allude to the case of *Milnes v. Branch*,^(u) where a man conveyed an estate to the use that he might receive a perpetual rentcharge, and subject thereto to the purchaser in fee,⁽¹⁾ and the purchaser covenanted in the usual way for payment to the seller, his heirs, and assigns, of the rent, and to build upon the land for further securing it; and it was held, that these covenants did not run with the rent in the hands of an *assignee*; and one ground was, that there was neither privity of contract nor privity of estate: the rent was reserved out of the original estate. The argument for the plaintiff, the assignee of the rent, lost sight, it was said, of the conveyance by which the rent was created. It was incorrect to state it as a rentcharge granted by the owner of the fee, it being a conveyance in fee to certain uses, one of which was, that the grantor should receive the rent, so that the rent arose out of the estate of the feoffors; *it was therefore not a grant by the owner of the fee, and the covenant was a covenant in gross.* This was decided by Lord Ellenborough, Mr. Justice Bailey, and Mr. Justice Abbott.

35. In *Randall v. Rigby*,^(x) where the conveyance is imperfectly stated, certain lands were conveyed to A. and B., their heirs and assigns, to the use that C., a party (probably the person conveying), his heirs and assigns, should receive a yearly rentcharge, and to other uses (probably to the use of A., and B. as his trustee,) and A. covenanted for himself, his heirs, executors, administrators, and assigns, with C., his heirs and assigns, that A. and B., their heirs, executors, * administrators, and assigns,

(u) 5 Mau. & Sel. 411, *qu.*; Roach v. Wadham, *inf.* 294. (x) 4 M. & W. 130.

2 H. & N. 793, as not having been acted upon; and a covenant to repair any *new* buildings was held to bind an assignee, although the covenant was only for the lessee, his heirs, executors, and administrators (not saying assignees). As to the right of the assignee of the reversion to recover for breach of a covenant to build or to repair, with reference to the periods of breach, see *Bennett v. Herring*, 3 C. B. N. S. 370.

(1) This was the effect of the deed, only that Branch, the purchaser, did not take the whole seisin, nor the whole legal estate, for the conveyance and limitation was to him and a trustee for him, in the old way, but the court made no observation upon the seisin or use in this view.

would pay the yearly rent; Mr. Baron Parke observed, that no doubt this covenant was collateral or in gross in one sense, that it did not run with the land or rent; for that Milnes and Branch was an authority.

36. These cases depend upon the *form* of the conveyance. The covenants were held not to run with a rent not granted by the covenantor.

37. And it has been held, where a rent is created by way of use, out of a grant to a third person, that a covenant by the grantor with that person to pay the rent, will not be transferred with the legal estate in the rent to the *cestui que use*,⁽¹⁾ and even where the grantor of a rent to one directly, covenants to pay it to the grantee, &c., it is doubtful whether the covenant will run with the rent in the hands of an assignee.^(y)⁽²⁾ And the court

(y) *Brewster v. Kidgell*, 12 Mod. 166; *Milnes v. Branch*, 5 Mau. & Sel. 441; *Butler v. Archer*, 12 Ir. C. L. R. 104.

(1) This was decided in the case of *Bascawen v. Cook*, 1 Mod. 223; 2 Mod. 138; the latter the best report, where a rentcharge was granted to two and their heirs for the life of a woman, in trust for her for her life, and the grantor covenanted with the trustees to pay the annuity to them for her use, it was held, that the use of the rent was executed by the statute of uses; but it was said that when the statute transfers an estate, it transfers together with it such remedies only as by law are incident to that estate, and not collateral ones, and therefore, as this covenant, being collateral, could not be transferred, the trustees were held entitled to maintain covenant. But this opinion, perhaps, depended upon the special provisions of the statute of uses as to rents, and upon the covenant being to pay the rent to the trustees, and not to the *cestui que use*; see Sugd. Pow. (8th edit.) 15, 43.

(2) Holt C. J. was of opinion that such a covenant by the grantor did run with the rent in the hands of an assignee, *Brewster v. Kidgell*, 12 Mod. 166, because it was a covenant annexed to the thing granted; but Lord Ellenborough, in the case of *Milnes v. Branch*, 5 Mau. & Sel. 411, said he was inclined to think that the language of Lord Holt as to the right of the assignee of the rent to have covenant was extrajudicial, and putting aside that dictum, he did not find any authority to warrant the position that the covenant runs with the rent. He did not see how the analogy, as it regarded covenants which run with the land, was to be applied; unless it be shown that this (the rent) was land, it might as well be applied to any covenant respecting a matter merely personal. There was another point in the case, to which we have before adverted, upon which the only other judge (Mr. Justice Bayley) who gave reasons relied altogether. There appears to be no foundation for shaking Holt's opinion. The rentcharge is an incorporeal hereditament, and issues out of the land, and the land is bound by it; the covenant, therefore, may well run with the rent in the hands of an assignee; the nature of the subject, which savors of the realty, altogether distinguishes the case from a matter merely personal. [See *Mitchell v. Warner*, 5 Conn. 497; *Wheelock v. Thayer*, 16 Pick. 68.] A covenant by the lessee of tithes not to allow any of the farmers to have any of the tithes, has been held to run with the tithes

of common pleas in a recent * case considered, that a covenant by the mortgagor with the mortgagee to pay the money was a collateral one, and did not run with the land.(z)(1) And notwithstanding the case of the coparceners, in a case where, upon a sale, one of two joint tenants of a lease released his share to the other, and the latter covenanted with the former to pay the rent, and perform the covenants, and indemnify the seller from them, the court of king's bench delivered an extrajudicial opinion, that this was the purchaser's own express collateral covenant, not a covenant that ran with the land.(a)(2)

(z) *Canham v. Rust*, 8 Taunt. 227.

(a) *Mayor v. Steward*, 4 Bur. 2439.

in the hands of an assignee so as to bind him. The court said they should consider whether there was any difference between lands and tithes as to this matter; it was objected that tithes were incorporeal, and could not endure or support a covenant by the lessee for him and his assigns to run with them, so as to bind the assignee; but if, it was added, we could strip the mind of the idea of the matter, there seemed to be no difference between an inheritance in lands and an inheritance in tithes. *Bally v. Wells*, 3 Wils. 25; *Brewer v. Hill*, 2 Anstr. 410; *Wilm.* 346. And although in this case, the question was as to an assignee of tithes being bound by a covenant entered into by the grantee thereof, yet the principle is the same as though the question were, whether the assignee could take advantage of a covenant entered into *with* the grantee: in each case the point turns upon the subject of the grant being such as a covenant may run with.

(1) The mortgage was for years, created by a conveyance to uses, limiting the term to the seller, and subject to it the fee to the purchaser, &c. The reasoning of the court is, perhaps, not altogether satisfactory, and the opinion was extrajudicial, as the plaintiff really was not assignee, but still such a covenant would probably be held to be a personal one. It is distinguishable from a covenant, like that in *Holt's* case, to pay the very thing granted, for here the thing granted is the term of years, and the money, though secured by it, is in the view of a court of law a collateral subject—the payment of it at the time fixed would defeat instead of supporting the estate, and a payment not according to the condition would be altogether inoperative upon the estate at law.

(2) Yet in a case where *in a lease* there was an *implied* covenant by the lessee of mines to build a smelting mill, although the lessor had not the property in the wastes upon which the mill was to be built, but only power to erect buildings on them for working the mines, and such buildings when erected belonged to him, and were removable by him, it was held the covenant ran with the land for the benefit of the lessor's assignees. The covenant was considered to tend to the support of the thing demised, and therefore should pass with the reversion. *Sampson v. Easterby*, 9 B. & C. 505. If a man convey land to another, reserving rent, &c., and grant a power of distress over his manor to the same person, his heirs and assigns, in case they shall be distrained upon for more services, this right will vest in the assignee. *Anon. Moo.* 179, pl. 318. — But if a grant of an annuity is made out of an equitable interest under an agreement for a lease, with a power of entry, mortgage, and sale, and a legal lease is afterwards obtained by the grantor, and assigned over to a stranger who is not privy to the

38. Where the covenants are in gross and do not run with the land, still they are binding on the covenantor and his representatives, who may be sued upon them by the covenantee or his representatives.(b) * And where the covenants entered into with a purchaser are covenants in gross, and he afterwards sells, the purchaser from him being entitled to the benefit of the former covenants, can compel him to allow his name to be used for the purpose of enforcing the covenants.(c)

39. And where upon a sale, the estate of the covenantor is an equitable and not a legal one, and consequently the covenants for title cannot run with the land, yet they will be deemed a contract for valuable consideration affecting the land, and the covenantor for further assurance will in equity be enforced specifically against the seller, the covenantor, and his heir.(d)

40. We have hitherto considered only in what cases covenants will run with the land in the hands of assignees of the purchaser. But questions often arise how far lands which remain in the hands of a seller are bound by his covenants in the hands of his assignees.(e)

41. Where the owners of land granted a watercourse through it to a man and his heirs, and covenanted for themselves, their heirs and assigns, to cleanse it, this covenant was held to bind

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| (b) <i>Stokes v. Russell</i> , 3 T. R. 678; 1 H. Black. 562. | (d) <i>Spencer v. Boyes</i> , 4 Ves. 370. |
| (c) <i>Riddell v. Riddell</i> , 7 Sim. 529. | (e) See <i>Canham v. Rust</i> , 8 Taunt. 227; <i>sup. pl. 37.</i> |

covenant, the powers of course cannot be enforced against him at law, for the interest which he takes under the assignment subsequently to the grant is not the same interest which the grantors originally had in the property. It is an interest newly created since the grant, and the assignee is not the assignee of any estate in the lands to which the powers of entry, &c., can attach, and, therefore, the assignment would be a breach of a covenant to do no act to impeach the annuity. *Pitt v. Williams*, 5 Ad. & El. 855. Where an underlease was made by a lessee for years, and it was covenanted between the parties that, during the term, every month the lessee should give an account to the lessor of the wine which he sold, and should pay to him for every tun sold so much money, the better opinion of the court, according to the report, was, that it was not a covenant which did go with the land or the reversion, but was a collateral thing, and did not pass by the lessor's assignment of his reversion. *God. 120; sup. pl. 33, n.* And yet the payment was really a rent measured by the quantity of wine sold upon the premises.

the land in the hands of an assignee, for it was a covenant that ran with the land.(f)

42. In *Brewster v. Kidgell*,(g) where upon a grant in fee of a rentcharge out of a manor, a question arose whether a memorandum that it was to be paid without any deduction, was simply a covenant, or a part of the grant, and it did not appear whether the owner of the land was heir or assignee, Holt C. J. said, there was another matter in which he had not consulted his brethren, and that was, whether the owner of the land was obliged by the covenant, which was a covenant by the grantor of the rent, who was seised in fee of the manor. Now, if he was assignee, he (the C. J.) did not think him chargeable in law. He made no doubt but that the assignee of the rent should have covenant against the grantor, because it was a covenant annexed to the thing granted, but that that covenant should run with the rent against the assignee of the land he saw no reason. But it became unnecessary to decide this point, as the other judges thought that the stipulation formed part of the grant itself, and did not operate as a mere covenant, and Holt's opinion has not been acquiesced in. The ground of Holt's opinion is in one report stated to be that the assignee could not be charged, because the *covenant did not run with the land, neither was it

(f) *Holmes v. Buckley*, Pre. C. 39; 1 Eq. Ca. Ab. 27, pl. 4. [See *Angell Watercourses* (6th ed.), § 262; *Norman v. Wells*, 17 Wend. 136; *Hurd v. Curtis*, 7 Met. 94. In *Morse v. Aldrich*, 19 Pick. 449, it appeared by a deed from S. C., the defendant's ancestor to W. H., that the former conveyed to the latter a tract of land adjoining the mill-pond in question, "with the full and free privilege of using and improving the said mill-pond, within certain limits, with the full liberty of ingress and egress, to dig out and carry away the whole, or any part of the soil, in said pond, and to divide the same pond, as described in the deed, into six separate and distinct fish-ponds." W. H. conveyed the premises to the plaintiff; after which disputes arose between S. C. and the plaintiff, relative to their respective rights, and for settling the same they entered into

sundry covenants in relation to the said grant, and qualifying the same. By the one, for the breach of which the action was brought, it was covenanted by S. C. (without naming his heirs or assigns), that he would draw off said pond, when requested by the plaintiff, six days in each year, for the purpose of giving the plaintiff an opportunity of digging and carrying away mud. S. C. died, and his estate in the mill-pond descended to the defendant. It was held, that the covenant was a real covenant, running with the land, and was binding on the heirs of the covenantor. See *Kennedy v. Scovil*, 12 Conn. 317.]

(g) 1 Ld. Ray. 317; 12 Mod. 166; see *Bascawen v. Cook*, 1 Mod. 223; 2 Mod. 138, *nom.* *Cook v. Herle*, which seems to have depended upon other grounds; see *Dawson v. Baldwin*, 1 Hay. & Jo. 24.

annexed to the thing granted, and therefore he ought to bring an action against the grantor or his heirs, for this covenant did not extend to any thing or parcel of the demise, but to *taxes*, which had not existence at that time, and was for that reason a personal covenant, by which the heir might be charged in respect of assets descended, but not otherwise. (*h*) (1)

43. In *Roach v. Wadham*, (*i*) where, as we have seen, the second purchaser was held to take under the appointment, and consequently did not take the estate of the first purchaser, and therefore was held not to be bound *as assignee* by the covenant to pay the rent entered into by the first purchaser, the counsel and the court were of opinion, that a covenant by a purchaser of the land to pay an annuity granted and secured out of the land to the seller, would run with the land so as to bind the assignee of

(*h*) 5 Mod. 374; *Bally v. Wells*, Wilm. 349.

(*i*) 6 East, 289.

(1) The case quoted by Holt, of *Cook v. Lord Arundel*, Hard. 87, does not bear him out. The plaintiff sought to discharge his own lands from, and to make the defendant's land subject to, the payment of a fee-farm rent, on the ground that the Duke of Norfolk, who formerly held the whole estate subject to the rent, had granted a portion of it to one under whom the plaintiff claimed, and covenanted that these lands should be discharged of the rent, upon which covenant the plaintiff sought relief, "and would have it taken to be a real covenant, which should run with the land, and charge the other lands with the whole rent." But the court was clearly of opinion that it was no more than an ordinary and a personal covenant, which must charge the heir only in respect of assets, and not otherwise, and thereupon dismissed the bill; see *Hatton v. Waddy*, 1 Hay. & Jo. 601. — Now, it was no doubt clear that the *covenant* was simply a personal one: there was no agreement to pay the whole of the rent out of the remaining estate in the duke's hands, nor does it appear in what character the defendant acquired the remaining estate. The case was no precedent that upon a grant of a rentcharge out of an estate, a covenant to pay it should not, like the rentcharge itself, be a burden upon the estate. But unless the character of the defendant was a protection to him, it seems that there was an equity on the part of the first purchaser to throw the whole of the rent upon the person who subsequently claimed the residue of the estate under the duke. This was decided a few years afterwards in a cause much contested, although upon points which are no longer doubtful: *Packhouse v. Middleton*, 1 Ch. Ca. 173; *Ld. Cornbury v. Middleton*, *Ib.* 208; see 1 Hay. & Jo. 620; *Averall v. Wade*, Ll. & Go. t. Sugd. 259, 260. — *Wilmot C. J.*, in *Bally v. Wells*, Wilm. 349, considered Holt's opinion wrong, although he did not state the opinions of the court with accuracy; he said, according to the note which contains the *heads* of his judgment, "Grant of rentcharge and covenant for enjoyment free from taxes; the question was, if it follow the land into the hands of assignee. Holt in *Salk*. thought not, and Lord Raymond with three judges were of a different opinion against Holt; and this is the better opinion, if notice of the covenant repel the right of deducting the taxes; and the case of the covenant to acquit of suit from one parcener to another, is in point in support of it."

the land in covenant at law. The real property commissioners observe,^(k) with reference to this case, that whether the burden of such covenants runs with the land, so that an action of covenant at law can be maintained against an alienee, seems to have been lately questioned. It has, they add, sometimes * been considered to depend on privity of estate, that is, on the party sought to be charged having or not having the estate of the covenantor. They then refer to the case of *Roach v. Wadham*, and observe that the court must, in that case, have considered this distinction as influencing their decision, for they suffered it to be argued at great length, which would have been unnecessary if the action would not lie, even supposing the defendant to have had the estate of the covenantor. They conclude, that it is certain that the rule of law as to this point is not very clearly laid down by the old text books, and it may have been the intention of the judges in *Spencer's case*, and other authorities, to confine the rule to covenants entered into by lessees. There is, they add, no doubt, ground for distinction between covenants by lessees and covenants by the owners of the fee.

44. These observations hardly do justice to the opinion of the court in *Roach v. Wadham*, where both the bar and the bench treated it as clear that the action would lie if the defendant was assignee. Mr. Abbott, for the defendant, contended that the deeds operated as an execution of the power, and not as a conveyance of the interest, and that the covenant for the payment of the rent did not pass [that is, run] with the estate; he then argued the question upon the power, and added, that though if it were considered as a conveyance by the releasee with the consent of the first purchaser, still the defendant would not be chargeable in this action, *because he was not sued as the assignee of the first purchaser*. Not a word escaped him as to the non-liability of the defendant to the action if he did take the estate of the first purchaser, and yet that would at once have settled the question. Lord Ellenborough, who delivered the opinion of the court, that the second purchaser took under the power, adverted to covenants entered into by the second purchaser with the first purchaser, to pay the rent and indemnify the latter from it, and observed that the covenants in the deed of conveyance to the

(k) Third Rep. p. 53.

second purchaser did not appear to the court at all to militate with their construction, for had it been the intention of the parties that the second purchaser should take as assignee of the first, such covenant on the part of the latter would have been less necessary than if he were intended to take as appointee, for, in the former case, the first purchaser would have had some security that he would not be called upon to pay this rent, *arising from the circumstance of the second purchaser's being liable to be sued by the original vendor*. But he added that, whether the conveyance were intended to operate in one way or the other, these covenants were fit and proper for the security of the first purchaser, for if the second purchaser were the assignee, and liable to be sued in covenant, the original vendor, if the second purchaser did not pay the rent, might sue the first purchaser on his *covenant to pay it, and in that case the second purchaser's covenant was proper for the first purchaser's indemnity; and if the second purchaser were not liable to be sued by the original vendor, and it was, nevertheless, the intention of the parties that the second purchaser should pay the rent, a covenant from him to the first purchaser to pay such rent, and to indemnify the first purchaser therefrom, became the more necessary. These quotations prove that the court had the point distinctly under their consideration, and entertained a clear opinion upon it.

45. The observation of the commissioners before quoted, that this question has sometimes been considered to depend on privity of estate, may perhaps mislead the student, for the *only* question is, whether, where the assignee is in in privity of estate, he is bound by the covenant; if there is no such privity, it is not denied by any that he is not chargeable in such an action. Upon the whole, it is submitted that covenants like those in *Brewster v. Kidgell* ought to be held to run in both directions; with the rent or interest carved out of or charged upon it in the hands of the assignee, so as to enable him to sue upon them; with the land itself in the hands of the assignee, so as to render him liable to be sued upon it.^(k¹)

46. We have already considered whether a covenant to produce deeds runs in both directions.

(k¹) [See Mr. Hare's notes to Spencer's [22], 115 *et seq.*; *Taylor v. Owen*, 2 Blackf. case in 1 Smith Lead. Cas. (5th Am. ed.) 301; *Plymouth v. Carver*, 16 Pick. 183.]

47. There are covenants sometimes entered into by owners of land with the purchasers of other adjoining land, that the former shall not be built upon or planted, or so as to impose other restrictions upon the mode of enjoyment of land in favor of persons taking no property in such land.^(l) Such a contract binds the land in the view of a court of equity, and in cases where the court can properly interfere, for example, where a person, buys with notice of the covenant, although it may not run with the land at law, a specific performance of it will be enforced, or, what amounts to the same thing, the owner of the land will be enjoined from committing a breach of the covenant; and it is not open to the objection of creating a perpetuity.^(m) And

(l) Third Report Real Prop. p. 54.

(m) *Whatman v. Gibson*, 9 Sim. 196; *Mann v. Stephens*, 15 Sim. 377; *Tulk v. Moxhay*, 2 Phil. 774; 11 Beav. 571; *Kep- pell v. Bailey*, 2 My. & Ke. 517; *Moxhay v. Inderwick*, 1 De G. & Sm. 708; 11 Beav. 582; *Patching v. Dubbins*, 1 Kay, 1, aff'd 23 L. J. Ch. 45; *Coles v. Sims*, 1 Kay, 65, aff'd 5 De G., M. & G. 1; *Child v. Douglas*, 1 Kay, 560; injunction dissolved, L. J. 1 Aug. 1854; *Taylor v. Gilbertson*, 5 Drew. 391, not a case of covenant; *Lukey v. Higgs*, 1 Jur. N. S. 200, *sup.*; *Hodgson v. Hodson v. Coppard*, 29 Beav. 4; 30 L. J. N. S. 20; [*Watertown v. Cowen*, 4 Paige, 510; *Carter v. Williams*, L. R. 9 Eq. 678; 39 L. J. Ch. 560; 18 W. R. 593; *Wilson v. Hart*, L. R. 1 Ch. Ap. 463; *Feilden v. Slater*, L. R. 7 Eq. 523; *Jack- son v. Fenwick*, 21 L. T. 223; *Johnstone v. Hall*, 2 K. & J. 414; *Herbert v. Mac- lean*, 12 Irish Ch. 84; *Eastwood v. Lever*, 33 L. J. Ch. 357; *Kerr Inj.* 530, 531; 2 Dart V. & P. (4th Eng. ed.) 702 *et seq.* Covenants in deeds of conveyance prescribing the mode in which the premises shall be improved, in restraint of the use that shall be made of them, have been sustained where the restriction is confined within reasonable bounds, and the parties in whose favor they are made, or those in privity with them, are interested in the subject matter of the restriction. *Grigg v. Landis*, 6 C. E. Green (N. J.), 494, 502;

Western v. MacDermot, L. R. 1 Eq. 499; S. C. L. R. 2 Ch. App. 72; *Mitchell v. Stewart*, L. R. 1 Eq. 54; *Brewer v. Mar- shall*, 3 C. E. Green, 337; *Barrow v. Rich- ard*, 8 Paige, 351; *Atlantic Dock Co. v. Leavitt*, 50 Barb. 135; *Green v. Creighton*, 7 R. I. 1; 2 Dart V. & P. (4th Eng. ed.) 702 *et seq.*; *Keates v. Lyon*, L. R. 4 Ch. Ap. 218; *Peek v. Matthews*, L. R. 3 Eq. 515. It is well settled that an injunction will be granted to restrain the erection of build- ings in breach of a covenant not to build in a particular manner, or on a particular site; not to follow a particular trade or business, or not to erect buildings except for particular specified uses or purposes. *Rankin v. Huskisson*, 4 Sim. 13; *Pigott v. Stratton*, Johns. 341; 1 De G., F. & J. 33; 6 Jur. N. S. 129; *Lloyd v. London, Chatham & Dover Railway Co.* 11 Jur. N. S. 380; 13 W. R. 698, L. JJ.; 2 De G., J. & S. 568; *Peek v. Matthews*, L. R. 3 Eq. 515; *Parker v. Nightingale*, 6 Allen, 341; *Whitney v. Union Railway Co.* 11 Gray, 359; *Atkins v. Chilson*, 7 Met. 404; *Bowes v. Law*, L. R. 9 Eq. 636; *Carter v. Williams*, L. R. 9 Eq. 678; *Hall v. Box*, 18 W. R. 820. It is not necessary, in order to justify the interference of the court, that the covenant should run with the land. *Parker v. Nightingale*, 6 Allen, 341, 344; *Western v. MacDermot*, L. R. 1 Eq. 499; S. C. L. R. 2 Ch. Ap. 72; *Wilson v. Hart*, 11 Jur. N. S. 735; 13 W.

where the owner of the fee had granted leases restricting the lessees from erecting an hotel without the consent of himself, his heirs, or assigns, which restriction was required in consequence of the lessor having covenanted with another lessee not to *let any land or house for that purpose, a purchaser of the reversion in fee of one of the plots leased subject to the restriction, who subsequently purchased the lease of the same lot, was restrained from building an hotel on the land.(n) But a party may so deal with the property retained by him as to deprive himself of the right in equity to enforce the covenant against the other party.(o) A covenant by a purchaser not to build on the land above a certain height does not give to the seller a right to build so as to use the upper service of light and air.(p)

48. Where a man leased part of his estate for years, and covenanted that if he, his heirs, or assigns, should, during the term, have an advantageous offer for an adjoining piece of freehold land, he would give the lessee, his executors, administrators, or assigns, a right of preéemption, it was said *arguendo* by

R. 988, V. C. W.; 2 H. & M. 551, affirmed L. R. 1 Ch. Ap. 463; 12 Jur. N. S. 460, L. JJ.; Clements v. Wells, L. R. 1 Eq. 200; 11 Jur. N. S. 991, M. R.; Barrow v. Richard, 8 Paige, 351; Feilden v. Slater, L. R. 7 Eq. 523; 2 Dan. Ch. Pr. (4th Am. ed.) 1654; Catt v. Tourle, L. R. 4 Ch. Ap. 654; Keates v. Lyon, L. R. 4 Ch. Ap. 218, 222. "The precise form or nature of the covenant or agreement is quite immaterial. It is not essential that it should run with the land. A personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice. It is not binding on him merely because he stands as an assignee of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform." Bigelow J. in Whitney v. Union Railway Co. 11 Gray, 364; see Catt v. Tourle, L. R. 4 Ch. Ap. 654; 2 Dart V. & P. (4th Eng. ed.) 702.]

(n) Jay v. Richardson, 31 L. J. N. S. 398; *infra*, ch. 22, s. 2, pl. 4; see Postle-

thwaite v. Lewthwaite, 8 Jur. N. S. 791.

[In a case where each of the original owners of houses in a row entered into covenants with the original owner of all the land on which they stood as to what should be done in the garden attached to each house, an injunction was granted at the suit of the owner of one of the houses, restraining a breach of the covenants by the owner of another house, notwithstanding that small breaches of the covenants by other owners had not been interfered with, and that he himself had committed a small breach. Western v. MacDermot, L. R. 1 Eq. 499; S. C. L. R. 2 Ch. Ap. 72. See Lloyd v. London, Chatham & Dover Railway Co. 2 De G., J. & S. 568; Whitney v. Union Railway Co. 11 Gray, 359; Peek v. Matthews, L. R. 3 Eq. 515.]

(o) Duke of Bedford v. Trustees of British Museum case, App. No. 1; 2 My. & Ke. 552; Schreiber v. Creed, 10 Sim. 9; Bristow v. Wood, 1 Col. N. C. 480; Kemp v. Sober, 1 Sim. N. S. 517.

(p) Pinchin v. London & Blackwall Ry. Co. 2 Eq. R. 1172.

the counsel of the lessor, and the purchaser under him, that it might be admitted, that although the assignee of the lessor was named, it did not run with the land demised, according to the case of *The Mayor of Congleton v. Patteson*,⁽¹⁾ because it was to do a thing collateral to the demised premises; and the reporter adds, "*acc. per curiam.*"⁽²⁾ This is not accurate, for what must have been intended to be said was, that although the assignee of the lessor was named, it did not run with the land *not* demised, so as to bind his assignee; it was not necessary to decide the point, nor was it argued, but the opinion of the court appears to be correct.^(q)

49. So, if the case had been reversed, and the lessee had covenanted to give preëmption of other lands to the lessor, it follows that the assignee of the lessee, although also owner of the other land, would not have been bound by the covenant.^(r)

50. An agreement by owners of land to contribute to the expense of a suit for establishing a *modus* is, of course, not a covenant which runs with the land, and therefore, if they sell their estates, the liability would not fall upon the purchaser.^(s)⁽³⁾

* 51. In *Collins v. Plumb*,^(t) where the vendor was possessed of some waterworks, and was seised of a freehold house with a well, and conveyed the house and well to a purchaser in fee, who covenanted for himself, his heirs, and assigns, not to sell the water from the well to the injury of the proprietors of the waterworks, their heirs, executors, administrators, and assigns, Lord Eldon, without giving any opinion whether the covenant ran with the land, refused to interfere to uphold the covenant, because, in every instance, the question would be for a jury, whether the act was done to the injury of the waterworks; as

(q) *Collison v. Lettson*, 6 Taunt. 224.

(s) *Stone v. Yea*, Jac. 434.

(r) Per Lord Brougham C. 2 My. &

(t) 16 Ves. 454.

Ke. 544.

(1) 10 East, 130; the covenant there in a lease was not to hire any persons to work in the mill which the lessee was at liberty to build, who were settled in other parishes, without a parish certificate.

(2) This is represented as a decision in *Keppel v. Bailey*, and the counsel of the plaintiff is said to have abandoned the ground that the covenant ran with the land (2 My. & Ke. 544), but this is not correct.

(3) For a full consideration of the *British Museum* case and *Keppel v. Bailey*, see the Appendix, No. 1; *Ackroyd v. Smith*, 10 C. B. 164.

therefore the seller had thought proper not to reserve the well, but to rest upon the covenant, there was the covenant, and the parties must make what they could of it.

52. Mr. Preston (*u*) observes, that purchasers in general attach more value to covenants for title than they are worth. Considering the property of parties, the chance of eventual insolvency, &c., covenants rarely produce the benefit which is expected from them, and when the property is subdivided by sales, it seems to follow from a maxim of law, that the purchasers lose the benefit of the former covenants, on the ground that the remedy cannot be apportioned, or in more correct terms, the covenantor cannot be subjected to several actions. Thus, where a man sells two farms to A., and covenants with him, his heirs, and assigns, and one of these farms is sold by A. to B., B. can never sue on this covenant, since it would subject the covenantor to several actions. The better opinion, however, seems to be, that an alienee of one of the estates could maintain covenant against the covenantor where the covenants run with the land, and as such, an action would lie either for damages, which would be measured by the loss of the assignee, as far as he might be entitled to recover it under the covenant, or for an act to be done, *e. g.* further assurance, which might properly be confined to the particular proportion of the property. It does not seem that any injustice would arise by suffering several covenants to lie, although it might expose the covenantor to inconvenience, whereas the denial of the right to each assignee might lead to positive injustice, or if not, to greater inconvenience on their part. (*x*) The real property commissioners (Third Report, 55, 56) propose that the burden of all covenants entered into *by* owners of land shall not, for the purpose of conferring a legal right of action, run with the land, reserving the jurisdiction of equity to inter-

(*u*) Abstracts, iii. 57, 58.

(*x*) See *Hare v. Cater*, Coo. 766; *Stevenson v. Lambard*, 2 East, 575; *Twynam v. Pickard*, 2 B. & Ald. 105; *Merceron v. Dowson*, 5 B. & C. 481; *Curtis v. Spitty*, 1 Bing. N. C. 756; *West London Ry. Co. v. London and North Western Ry. Co.* 11 C. B. 354; *Badeley v. Vigurs*, 4 E. & B. 71. [Where a covenant running with the land is divisible in its nature, if

the entire interest in different parcels of the land passes by assignment to separate individuals, the covenant will attach on each parcel *pro tanto*. *Astor v. Miller*, 2 Paige, 68. The assignee of an undivided moiety of leasehold premises can maintain an action in his own name upon a covenant of warranty contained in the original lease. *Van Horne v. Crain*, 1 Paige, 455.]

fere by injunction or otherwise for enforcing the due performance of such covenants in all cases in which such courts may deem it proper so to do, but that all such covenants may remain binding as *personal obligations, and of the nature of specialties. It would be better perhaps to leave the law as it stands than thus to alter it. An attempt at legislation on this head would, I fear, lead to grave difficulties, which may readily be avoided by a steady adherence to principle in judicial decisions on the subject.

SECTION II.

TO WHAT ACTS COVENANTS FOR TITLE EXTEND.

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| <ol style="list-style-type: none"> 1. Five distinct covenants: covenant where the seller has a power. 3. Do not extend to tortious evictions. — Unless the party is named. 4. Or the seller himself assert his title. 5. Or the covenant embrace pretended claims. — Suit in equity a disturbance. 6. <i>Jerritt v. Weare</i>. — Observations upon it. 7. Covenant for right to convey extends to capacity to grant. 8. Whose entry is a breach where the covenant is against persons claiming by the means, title, &c., of covenantor. 9. { Or by or through his acts or means: 10. { act not proceeding from covenantor. 11. Appointee a person claiming under covenantor. | <ol style="list-style-type: none"> 12. Quit-rents incident to tenure within general covenant. 13. Arrear by default: <i>Howes v. Brushfield</i>. — Observations upon it. 14. Default includes persons whom the covenantor might have barred: <i>Lady Cavan v. Pulteney</i>. 15. Arrear of land tax. 16. Covenant by trustee: permitted or suffered, or been party or privy to. 17. Default does not include persons whom covenantor had not the power to bar: <i>Woodhouse v. Jenkins</i>. 18. Covenant confined to the estate conveyed. |
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1. It has already been observed, (a) that the covenants usually entered into by a vendor seised of the inheritance, are, 1st, That he is seised in fee; 2dly, That he has power to convey; 3dly, For quiet enjoyment by the purchaser, his heirs, and assigns; 4thly, That the land shall be holden free from incumbrances; and lastly, for further assurance. (a¹) The five covenants are several and distinct, but the first and second of them are synonymous; (a²) for if a man be seised in fee, he has 'the' power to

(a) *Sup. ch. 14, s. 3.*

et seq. & notes; Wilson v. Wood, 2 Green (N. J.), 216.]

(a¹) [*Ante*, 573, § 2; 2 Cruise Dig. by Mr. Greenleaf, vol. 4, tit. 32, ch. 26, § 46

(a²) [In Massachusetts, a covenant in a

sell.(b) But the converse of this proposition is not universally true.(c) A man having merely a power to appoint an estate, cannot be said to be seised in fee of the estate, although he has a right to convey; and accordingly it is usual to omit the first covenant, and to insert a covenant that the power was well created, and is not suspended or extinguished.

2. We may consider, 1st, To what and against whose acts general and limited covenants extend; 2dly, In what cases restrictive words * extend to all the covenants in the deed; and 3dly, To what remedy a purchaser is entitled under covenants for the title, in case he is evicted, or the title prove bad.

3. I. Although covenants are unlimited, and are not restricted to the acts of persons claiming lawfully, yet it is now settled,(d) although the contrary was formerly holden, that such a covenant shall not extend to a tortious eviction, but to evictions by title only, unless a vendor covenants to indemnify a purchaser against a particular person by name.(e)

deed of a "good right to sell and convey," does not imply a warranty of absolute title, but only of actual seisin and possession. *Raymond v. Raymond*, 10 Cush. 134. *Dewey J.*: "The covenant of a right to convey is synonymous with the covenant of seisin. The actual seisin of the grantor will support both of these covenants irrespective of his having a good indefeasible title. *Marston v. Hobbs*, 2 Mass. 437; *Bickford v. Page*, 2 Mass. 455; *Bearce v. Jackson*, 4 Mass. 408; *Slater v. Rawson*, 6 Met. 445." See *Willard v. Twitchell*, 1 N. H. 177; *Slater v. Rawson*, 1 Met. 450, 456; *Rawle Cov.* (3d ed.) 25. But see *Triplett v. Gill*, 7 J. J. Marsh. 436.]

(b) *Nervin v. Munns*, 3 Lev. 47; *Brown- ing v. Wright*, 2 Bos. & Pul. 13.

(c) 4 Cruise Dig. 78, s. 30.

(d) *Dudley v. Folliott*, 3 T. R. 584; *Dy. 238 a*, marg.; *Crosse v. Young*, 2 Show. 425, cases cited in n. 3 T. R. 587; in some of which, however, the point was not de-

cided, but a distinction was taken between *express* and *implied* covenants.

(e) *Foster v. Mapes*, Cro. Eliz. 212 Hob. 35; 1 Ro. Ab. 430, pl. 13; *Hayes v. Bickerstaff*, Vaugh. 118; *Nash v. Palmer*, 5 Mau. & Sel. 374; *Foule v. Welsh*, 1 B. & C. 29; [*Ellis v. Welch*, 6 Mass. 246, 252; *Twambly v. Henley*, 4 Mass. 442; *Hamilton v. Cutts*, 4 Ma-s. 352; per *Spencer J.* in *Greenby v. Wilcocks*, 2 John. 4; per *Kent C. J.* in *Folliard v. Wallace*, 2 John. 402; *Kent v. Welch*, 7 John. 259; *Sedgwick v. Hollenback*, 7 John. 376; *Van Slyck v. Kimball*, 8 John. 198; *Vander Karr v. Vander Karr*, 11 John. 122; *Fowler v. Poling*, 6 Barb. 165; *Kelly v. Dutch Church*, 2 Hill, 105; *Mitchell v. Warner*, 5 Conn. 497; *Sterling v. Peet*, 14 Conn. 245; *Duvall v. Craig*, 2 Wheat. 45, 61; *Yancy v. Lewis*, 4 Hen. & M. 390; *Loomis v. Bedel*, 11 N. H. 74; *Beebe v. Swartwout*, 3 Gilman, 162; *Rantin v. Robertson*, 2 Strobb. 366; *Davis v. Smith*, 5 Geo. 274; *Witty v. Hightower*, 12 Sm.

4. And where the covenantor himself does any act *asserting a title*, it will be a breach of the covenant, although he covenanted against *lawful* disturbances only, and the act done by him was tortious, and might be the subject of an action of trespass; (f) and if the covenant extends to his heirs or executors, the rule equally applies to them. (g) But the act must be an

& M. 478; Naglee v. Ingersoll, 7 Barr, 185; Simpson v. Hawkins, 1 Dana, 306; 2 Greenl. Ev. § 244; Gleason v. Smith, 41 Vt. 293. The covenants for quiet enjoyment, and of general warranty, require the assignment of a breach by a specific ouster, or eviction by a paramount legal title. 4 Kent (11th ed.), 479; Clark v. M'Anulty, 3 Serg. & R. 364; Jones v. Agnew, 1 Ham. 389; Richert v. Snyder, 9 Wend. 416; Prescott v. Trueman, 4 Mass. 627; Pollard v. Dwight, 4 Cranch, 421; Boothbay v. Hathaway, 20 Maine, 251; Swazey v. Brooks, 34 Vt. 451; Knepper v. Kurtz, 58 Penn. St. 480; Eastabrook v. Smith, 6 Gray, 577. But to authorize a recovery by a grantee upon the covenants of warranty, an eviction by legal process is not necessary. He may surrender possession to the rightful owner; and that will be a sufficient ouster to entitle him to his action. Fowler v. Poling, 6 Barb. 165; Hamilton v. Cutts, 4 Mass. 349; Stone v. Hooker, 9 Cowen, 154; Greenvault v. Davis, 4 Hill, 643; Sterling v. Peet, 14 Conn. 245; Loomis v. Bedel, 11 N. H. 74; Pitkin v. Leavitt, 13 Vt. 379; Rawle Cov. (3d ed.) 245 *et seq.*; Drew v. Towle, 30 N. H. 527; Woodward v. Allen, 3 Dana, 164; Hanson v. Buckner, 4 Dana, 254; Willson v. Willson, 25 N. H. 229; Slater v. Rawson, 1 Met. 455; Patton v. McFarlane, 3 Penn. St. 425; Poyntell v. Spencer, 6 Barr, 254; Steiner v. Baughman, 12 Penn. St. 106; Knepper v. Kurtz, 58 Penn. St. 480; Haffey v. Birchett, 11 Leigh, 88; Leary v. Durham, 4 Geo. 606; George v. Putney, 4 Cush. 355; Whitney v. Dinsmore, 6 Cush. 128; Smith v. Shephard, 15 Pick. 149; Sprague v. Baker, 17 Mass. 586; Mitchell v. Warner, 5 Conn. 521; Booth v. Starr, 5 Day, 282;

2 Greenl. Ev. § 244; Boyd v. Bartlett, 36 Vt. 9; Wilson v. Cochran, 48 Penn. St. 107; Rawle Cov. (3d ed.) 240 *et seq.* But in case the grantee surrenders, or suffers the possession to pass from him without a legal contest, he takes upon himself the burden of showing that the person who entered had a legal title paramount to that of his grantor. Fowler v. Poling, and the other cases cited above. Edwards J., in the above case of Fowler v. Poling, notes a difference between an eviction under a covenant for quiet enjoyment and one under a covenant of warranty, holding that the former covenant relates only to the *possession*, and the eviction is merely required to be of lawful right, while the latter relates to the *title*, and the eviction must be not only by lawful right, but by paramount title. 6 Barb. 170, 171. See Waldron v. M'Carty, 3 John. 471; Kortz v. Carpenter, 5 John. 120; Whitbeck v. Cook, 15 John. 483; Webb v. Alexander, 7 Wend. 281; Grist v. Hodges, 3 Dev. 200; 2 Greenl. Ev. § 243; Knapp v. Marlboro, 34 Vt. 235. The covenant of warranty is not broken by the fact that a third person is in possession of the land at the time of making the deed, and has afterwards acquired a title to the land by force of the statute of limitations; the covenantee having suffered it by his own laches in not sooner recovering possession from said third person. Phelps v. Sawyer, 1 Aiken (Vt.), 150.]

(f) Lloyd v. Tomkies, 1 T. R. 671; Crosse v. Young, 2 Show. 425, MS.; [Sedgwick v. Hollenback, 7 John. 376; Dyett v. Pendleton, 8 Cowen, 727; S. C. 4 Cowen, 581.]

(g) Forte v. Vine, 2 Ro. R. 19 (2d number).

assertion of title; sporting over the land,^(h) or entering for the purpose of assaulting the purchaser, would not be a breach.⁽ⁱ⁾

5. So a covenant against all claiming or *pretending to claim* any right extends to a tortious eviction.^(k) And a suit in equity, by which the purchaser is disturbed, is within a covenant for quiet enjoyment against disturbances generally.^(l)

6. In a case where the seller covenanted generally that he was seised in fee, without any condition, &c., or any other estate, matter, cause, restraint, or thing whatsoever, whereby to alter, bar, change, charge, burden, impeach, incumber, or determine the same, and had good right to convey the same; it appeared that the lady of the manor had actually demised a small part of the land sold for ninety-nine years, determinable on lives, and the lessees had entered and continued to enjoy the estates. It was held that the leases were made by mistake, and did not amount to a disseisin, and that the covenant did not extend to the leases. It was asked, what can a man be supposed to covenant against beyond the validity of the title? and most assuredly not against these surreptitious pocket leases. * The action of covenant, it was added, only extended to the consequence of legal acts, and the reason is to be found in the case of *Hayes v. Bickerstaff*, that the law shall never judge that a man covenants against the wrongful acts of strangers.^(m) It will be observed, that the leases were accompanied with actual possession by the lessees, who had expended money on the property. They were, therefore, within the covenants, and unless the covenants were held to extend to them, general covenants for title would be waste paper. They are always intended to guard against a title adverse to the covenantor's although it may not be a lawful title. Clearly the leases were a charge on the property *at the time of the conveyance*, and an ejectment at all events was necessary to dispossess the lessees. They therefore were an incumbrance within the covenant. It is not like the case of interruptions, subsequently to the conveyance, by persons not claiming

(h) See *Seddon v. Senate*, 13 East, 72.

(i) *Penn v. Glover*, Cro. Eliz. 421.

(k) *Chaplain v. Southgate*, 10 Mod. 384; Com. 230; *Perry v. Edwards*, 1 Str. 400. [See 2 Cruise Dig. by Mr. Greenleaf, vol. 4, tit. 32, ch. 26, §§ 56, 57.]

(l) *Calthorp v. Hayton*, 2 Mod. 54; *Hunt v. Danvers*, T. Ray. 370; [*Martin v. Martin*, 1 Dev. 413.]

(m) *Jerritt v. Weare*, 3 Price, 575.

lawfully. The case was argued upon much higher grounds, and this probably led the court not to give due weight to the above simple view of it.^(m¹)

7. A covenant for right to convey extends not only to the title of the covenantor, but also to his capacity to grant the estate.^(m²) Therefore, where, upon a conveyance by a man and his wife, the husband covenanted that they had good right to convey the lands, and the wife was under age, the covenant was adjudged to be broken.⁽ⁿ⁾

8. II. A covenant for quiet enjoyment against A. and any other person by his means, title, or procurement, is broken by the entry of a person in whose name A. purchased jointly with his own name.^(o)

9. So if A. covenant for quiet enjoyment against all claiming by, from, or under him, a claim of dower by his wife is within the covenant; but, otherwise, if the mother of A. claim her dower, because she does not claim by, from, or under him.^(p)

(m¹) [Rawle Cov. (3d ed.) 45-47.]

(m²) [See 2 Cruise Dig. by Mr. Greenleaf, vol. 4, tit. 32, ch. 26, §§ 48, 49, 50; *ante*, 577 note. A seisin in fact, though obtained tortiously, is sufficient to satisfy the covenant of seisin, *ante*, 577, note. This position is, however, questioned in *Richardson v. Dorr*, 5 Vt. 21, and in *Lockwood v. Sturdevant*, 6 Conn. 385, and some other cases, *ante*, 577, note. It is held in Vermont that a covenant in a deed of land, that the grantor "is well seised in fee simple, and has good right to bargain and sell the premises," imports a covenant of title. *Catlin v. Hurlburt*, 3 Vt. 407; *Pierce v. Jackson*, 4 Vt. 253. So of a covenant that he "is seised of an indefeasible estate in fee simple." *Garfield v. Williams*, 2 Vt. 327; see *ante*, 577, note.]

(n) *Nash v. Aston*, Sir T. Jones, 195. [See *Lockwood v. Sturdevant*, 6 Conn. 373; *Beckwith v. Marryman*, 2 Dana, 371.]

(o) *Butler v. Swinnerton*, Pal. 339; *Cro. Jac.* 657; *Baker v. Harris*, 9 Ad. &

El. 532; *Williams v. Burrell*, 1 C. B. 402, a warranty; [2 Cruise Dig. by Mr. Greenleaf, vol. 4, tit. 32, ch. 26, §§ 78, 79.]

(p) *God.* 333; *Pal.* 340; [Rawle Cov. (3d ed.) 119-125; *ante*, 206, note, 305, note. An inchoate right of dower is an existing incumbrance on land, and not a mere possibility or contingency; *Porter v. Noyes*, 2 Greenl. 22; *Fletcher v. State Capital Bank*, 37 N. H. 396-398; *Jenks v. Ward*, 4 Met. 404; and it is a breach of the covenant against incumbrances; *Shearer v. Ranger*, 22 Pick. 447; *Barnett v. Gaines*, 8 Ala. 373; *Jones v. Gardiner*, 10 John. 266; *Donnell v. Thompson*, 1 Fairf. 170; *Smith v. Cannell*, 32 Maine, 126; *Jeter v. Glenn*, 9 Rich. 376; *Henderson v. Henderson*, 13 Missou. 152; *Blair v. Rankin*, 11 Missou. 440; *Carter v. Denman*, 3 Zabrisk. 273; *Greenwood v. Ligon*, 10 Sm. & M. 615. But see the doubts expressed upon this point in *Powell v. The Munson and Brimfield Manuf. Co.* 3 Mason, 355; *Fuller v. Wright*, 18 Pick. 405; *Nyce v. Clark*, 17 Ohio, 71.]

10. But the word *acts* imports something done by the person against whose acts the covenant is made; and the word *means* has a similar import, something proceeding from the person covenanting; therefore, where a man holding under a lease which contained a power of reëntry in case a particular act should be done, made an underlease, in which he covenanted for quiet enjoyment without any interruption by him, or by or through his acts or means, and this lessee, in alleged ignorance of the terms of the original lease, underlet the estate, and the underlessee committed the act which gave to * the original lessor a right of entry, which he accordingly exercised, the eviction was held not to be within the covenant, for it was not produced by anything proceeding from the covenantor, but from the person in possession of the premises.(q)

11. A covenant for quiet enjoyment against A., or any person claiming under him, extends to a person deriving title under an appointment made by A. by virtue of a power, in the creation of which he concurred, although the estate did not move from A., and the estate of the appointee is, according to the general rule, considered as limited to him by the deed creating the power.(r)

12. A covenant for quiet enjoyment, quietly and clearly acquitted of and from all grants, &c., rents, rentcharges, &c., whatsoever, has been holden to extend to an annual quitrent payable to the lord of the manor, *and incident to the tenure* of the lands sold, although there was no arrear of the rent due.(s)

13. A covenant for quiet enjoyment against any interruption of, from, or by the vendor or his heirs, or any person whomsoever, legally or equitably claiming, or to claim any estate, &c., in the premises, by, from, under, or in trust for him, or them, or by, through, or with his or their acts, means, *default*, privity, consent, or procurement, was adjudged to extend to an arrear of quitrent due at the time of the conveyance, although it was not shown that the rent accrued due during the time the vendor held the

(q) *Spencer v. Marriott*, 1 B. & C. 457.

(r) *Hurd v. Fletcher*, Doug. 43; *Evans v. Vaughan*, 4 B. & C. 261; *Calvert v. Sebright*, 15 Beav. 156; *Carpenter v. Parker*, 3 C. B. N. S. 206. [See *Rawle Cov.* (3d ed.) 531, 532.]

(s) *Hammond v. Hill*, Comyns, 180.

[See *New York Corporation v. Cushman*, 10 John. 96. The taking of land by authority of law for public purposes upon compensation being made, is not a breach of the covenant for quiet enjoyment. *Frost v. Earnest*, 4 Wharton, 86; *Ellis v. Welch*, 6 Mass. 246. See *post*, 610, note.]

estate. For the court said, if it were in arrear in his lifetime, it was a consequence of law, that it was by *his default*; that is, by *his default* in respect of the party with whom he covenants to leave the estate unincumbered.(t) In this case it was argued by the counsel for the vendor, and apparently on very solid grounds, that to make the vendor liable to the arrear of his rent, under his covenant, would be tantamount to a decision that the covenant, although limited, should extend to the acts of all the world. The clear intention of the parties was, that the vendor should covenant against his own acts only; and yet it should seem that the argument of the court would apply as well to a mortgage, or any other incumbrance created by a prior owner, as to an arrear of quitrent, in payment of which a former occupier made default. The reader should be cautious how he applies this decision to cases arising in practice, as it may lead him to draw conclusions not authorized by prior decisions.

14. We should be careful to distinguish the foregoing case from * that,(u) where the lessor, *reciting that he was seised of an estate of freehold and inheritance in the estate,(x) covenanted for quiet enjoyment against himself, his heirs, &c., or any other person or persons lawfully claiming by, from, or under him, &c., or by or through his, their, or any of their acts, means, default, or procurement.* The lessees were evicted by the remainder-man under a settlement, and it appeared that the lessor could have obtained the fee simple by suffering a recovery; and it was considered to be clear, that on eviction by any person claiming paramount to the lessor, the lessees must, upon that eviction, have under the covenant in the leases satisfaction from his assets. The ground of this opinion must have been, that the eviction was owing to the *default* of the lessor, in not suffering a recovery. He assumed to be tenant in fee, and the nature of his title rested in his own breast; whether the default arose from fraud or negligence was to the lessees immaterial. The act required to make good the title was within the compass of his own estate and within his own power, therefore the omission to do it was a

(t) *Howes v. Brushfield*, 3 East, 491.
Consider *Ld. Alvanley's* judgment in
Hesse v. Stevenson, 3 Bos. & Pul. 565.

(u) *Lady Cavan v. Pulteney*, 2 Ves. jr.
344; Reg. lib. B, 1799, fol. 816.

(x) *Crofts v. Middleton*, 2 K. & J. 194,
8 De G., M. & G. 192.

default by him within the limit of a covenant strictly restrained to his own acts, and he assumed, as far as his own acts or defaults extended, to be seised in fee. In *Howes v. Brushfield*, the seller assumed in like manner to be seised free from incumbrances, but he did not assume to be entitled free from incumbrances by whomsoever created; the two cases would have been similar had it not been in the seller's own power to have suffered the recovery in *Cavan v. Pulteney*. If a third party's concurrence had been necessary, which the seller must have purchased, and that had been deemed obligatory upon him within his covenant, then the case would have been the same as *Howes v. Brushfield*.

15. A covenant simply for quiet enjoyment without any let, suit, &c., of or by the covenantor, his heirs or assigns, or any other person or persons lawfully claiming or to claim by, from, or under him or them, of course does not extend to an arrear of land tax due from the covenantor, for that is a claim against, and not under him.(y)

16. The usual covenant by a trustee in a conveyance to a purchaser is not only that he has not made, &c., or *permitted or suffered*, but that he has not been *party or privy* to any act whereby the estate is incumbered. The latter words are not supplied by the former; for the words, "permitting and suffering," do not bear the same meaning as "knowing of and being privy to:" the meaning of the former is, that the covenantor has not concurred in any act over which he had * a control; they apply only to that which he could prevent; and such a covenant extends to such permissive acts only as have, through the permission, an operative effect in charging the estate. Therefore, where a mere trustee to bar dower (the purchaser taking the fee, subject to his interposed estate), joined with the purchaser in making a mortgage, having previously concurred with him in another convey-

(y) *Stanley v. Hayes*, 3 Q. B. 105. [See *West v. Spaulding*, 11 Met. 556. A covenant of warranty against "all persons claiming under the grantor," cannot be extended, by parol to a general warranty against a title from other sources. *Raymond v. Raymond*, 10 Cush. 134. This covenant has no greater effect than a warranty "against title acquired through the grantor. It falls short of the general covenant of warranty, and is not a covenant to warrant against a title held by others derived from other independent sources, and not through the grantor," *Dewey J.*]

ance,(z) it was of course held that the latter conveyance was a breach of his covenant, that he had done no act to encumber the estate, and the court would not look to the nature of his estate or the trust engrafted on it; but it was held that he was not responsible for the concurrence of the purchaser in the same deed, although he had covenanted that he had not *permitted or suffered* any act whereby any incumbrance was created. The common words, that he had not been party or privy to, would have given a remedy under the covenant; for of course he was party, and therefore privy to the conveyance, although the purchaser might have conveyed without him.

17. In *Woodhouse v. Jenkins*,(a) a tenant for life and his eldest son remainder-man in tail, demised to A. for ninety-nine years, he being aware of their title, and they covenanted with him for quiet enjoyment against themselves, their heirs and assigns, and all persons claiming under them. A. granted an underlease of the estate to B., and covenanted for quiet enjoyment against himself, his heirs, executors, administrators, and assigns, "or of or by any other person or persons whomsoever lawfully claiming or to claim by, from, or under him, them, or any of them, or by his, their, or any of their acts, means, consent, neglect, default, privity, or procurement." The tenants for life and in tail both died, the latter without issue, and B. was evicted by the next remainder-man; it was held that A. was not liable on this covenant, for the eviction was by a title paramount, which he could not have defeated.

18. Sometimes a covenant does not extend to the subject in dispute, as where a covenant that the seller was seised in fee was held not to extend to a covenant that the purchaser might draw water at a well, so that it was no breach of the first covenant that the seller was not seised in fee of the well.(b)

(z) *Hobson v. Middleton*, 6 B. & C. Nels. 192; *Rhodes v. Bullard*, 7 East, 295. 116; *Ld. Shrewsbury v. Gould*, 2 B. &

(a) 9 Bing. 431; 2 Mo. & Sco. 599; *Ald. 493*, for implication from words of *Ireland v. Bircham*, 2 Sco. 207. covenants.

(b) *Butterfield v. Marshall*, Lutw. by

* SECTION III.

EXTENT OF RESTRICTIVE WORDS.

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|---|---|
| 2. General covenants not cut down without clear intention.
3. Restrictive words to first covenant extend to all having the same object.
5. Covenant for quiet enjoyment where general: <i>Howell v. Richards</i> .
6. <i>Nind v. Marshall</i> .
7. <i>Young v. Raincock</i> . | 8. First general covenant not restrained by other limited ones.
9. <i>Smith v. Compton</i> .
10. General covenant does not enlarge subsequent limited one.
11. Or where covenants are of divers natures. — For title and value.
13. Equity reforms general covenants entered into by mistake. |
|---|---|

1. ALTHOUGH the usual and technical manner of restraining covenants is not adopted, yet an *agreement*, in any part of a deed, that the covenants shall be restrained to the acts of particular persons, will be good, notwithstanding that the covenants themselves are general and unlimited.(a)

2. General covenants will not, however, be cut down, unless the intention of the parties clearly appears.(a¹) Therefore, in the case of *Cooke v. Fowndes*,(b) where the vendor covenanted

(a) *Brown v. Brown*, 1 Lev. 57. [See *Cole v. Hawes*, 2 John. Cas. 203. The covenants of the grantor in a deed, whereby he conveys all his right, title, and interest in and to certain real estate described by metes and bounds, courses and distances, with the usual covenants of seisin and warranty, are to be limited to the estate and interest of the grantor in the granted premises, and are not general covenants extending to the whole parcel described in the deed. *Sweet v. Brown*, 12 Met. 175; *Allen v. Holton*, 20 Pick. 458; *Rawle Cov.* (3d ed.) 525 *et seq.*; *Wyman v. Harman*, 5 Grattan, 157; *Kimball v. Semple*, 25 Cal. 440; *McNear v. McComber*, 18 Iowa, 12. But see *Loomis v. Bedel*, 11 N. H. 74, 86, 87; *Hubbard v. Althorp*, 3 Cush. 419; *Whiting v. Dewey*, 15 Pick. 434; *Mills v. Catlin*, 22 Vt. 98; *Williamson v. Test*, 24 Iowa, 138.]

(a¹) [In a case where the grantor, after granting a tract of land described by metes and bounds, added on the deed the

words "containing by estimation *six hundred* acres, and the same is hereby warranted to contain at least *five hundred* acres," and then covenanted generally, that he was seised in fee simple, &c.; and had full power to convey, &c., and for quiet enjoyment, and against incumbrances, &c., and warranty, it was held that the general covenants in the deed were restrained by the special covenant as to the quantity of the land. *Whallon v. Kauffman*, 19 John. 97; see *Jackson v. Stevens*, 16 John. 110.]

(b) 1 Lev. 40; 1 Keb. 95; *Noble v. King*, 1 H. Black. 34; *Proctor v. Johnson*, Yelv. 175; *Cro. Eliz.* 809; *Cro. Jac.* 233; 2 Brownl. 212, judgment of C. P. aff'd. The grant was of the whole estate, and the condition was to perform all grants; see 1 Nev. & Per. 639; 2 Bo. & Pul. 25; *Seddon v. Senate*, 13 East, 63; *Barton v. Fitzgerald*, 15 East, 530; *Stannard v. Forbes*, 6 Ad. & El. 572.

that he was seised of a good estate in fee, *according to the indenture made to him by B.* (of whom he purchased), it was determined to be a general covenant; for the reference to the conveyance by B. served only to denote the limitation and quality of the estate, and not the defeasibleness or indefeasibleness of the title.

3. Where restrictive words are inserted in the first of several covenants having the same object, they will be construed as extending to all the covenants, although they are distinct. Thus, in *Browning v. Wright*,^(c) where a vendor who claimed an estate in fee by purchase, sold the estate, and covenanted first, that, notwithstanding anything by him done to the contrary, he was seised in fee, "*and that he had good right, &c.*, to convey in manner aforesaid," it was holden that the generality of the latter covenant was restrained by the restrictive words in the former,^(d) for the purchaser was according to the general practice entitled to limited covenants only, and the special covenants would be of no use if the other were general; *besides, the words *and that* coupled the latter part of the covenant with the former part, and the latter part was overridden by the introductory limited words.^(d')

4. So in a case, where the seller of a leasehold estate depending upon a life covenanted that, notwithstanding any act by him done, the lease was valid, *and that* the same and the term therein expressed was in full force, and in nowise determined, &c., otherwise than by effluxion of time, the second covenant was held to be restrained by the first, and was therefore not broken, although the life upon which the lease depended had dropped before the assignment. It was considered to be no objection to this construction that these last words rendered the restriction nonsensical, as effluxion of time could have been no act of the covenantor.^(e) And the facts that the seller knew the life had dropped before the assignment, and had paid rent to the lessor after this

(c) 2 Bos. & Pul. 13; *Nervin v. Munns*, 3 Lev. 46.

(d) 3 Bos. & Pul. 574; *Peles v. Jervies*, Dy. 240, marg.; Cro. Jac. 615, pl. 5.

(d') [See *Sumner v. Williams*, 8 Mass. 162, 217.]

(e) *Stannard v. Forbes*, 1 Nev. & Per. 633; 6 Ad. & Ell. 572; *Broughton v. Conway*, Dy. 240; Moo. 58; 8 East, 89; 1 Brod. & Bing. 340; 3 Moo. 730.

knowledge, so as to create a tenancy from year to year, were deemed immaterial; for the construction of the covenant could not depend upon the covenantor's knowledge, and the lease had expired before the tenancy from year to year was created, so that the act of the seller did not affect it.

5. But (*f*) where the covenants were introduced with the usual words, restricting them to the covenantor's own acts, but the covenants for quiet enjoyment ended thus: "of or by the said grantors or any of them, &c., *or of or by any other person or persons whatsoever*:" and the covenant against incumbrances was general, excepting only a chief rent; it was determined, that the covenant for quiet enjoyment was not restrained by the introductory words of restriction, but was general and unlimited; for the covenant was a distinct covenant from the covenant for title, (*g*) and a man may not choose to guarantee his title generally, and yet may readily undertake that the possession shall not be disturbed; no case was found in which it was held that the covenant for quiet enjoyment was all one with the covenant for title, or in necessary construction to be governed by it otherwise than as according to the general rules for the construction of deeds. (*g*¹)

6. In a later case, (*h*) the covenants in an assignment of a leasehold estate were, 1. that notwithstanding any act by the seller, the lease was a good lease; 2. "and further, that" the purchaser might peaceably enjoy without any interruption from "the seller, his executors, administrators, or assigns, or any other person or persons whatsoever having or lawfully claiming, or who

(*f*) Howell v. Richards, 11 East, 633.

(*g*) See Blatchford v. Mayor of Plymouth, 3 Bing. N. C. 691.

(*g*¹) [The decision in Howell v. Richards, was cited and approved in Estabrook v. Smith, 6 Gray, 572, wherein it was held, that where there is a general covenant of warranty in a deed of land, preceded by a covenant against all incumbrances except a certain mortgage to a third person, the mortgage is not excepted from the covenant of warranty. See Sumner v. Williams, 8 Mass. 202, 203; Freeman v. Foster, 55 Maine, 508,

510; Kinnear v. Lowell, 34 Maine, 299. But where the words of exception or qualification are not annexed to any one of the covenants, but are a part of the description of the premises granted, they apply to all of the covenants alike. Freeman v. Foster, 55 Maine, 508, 510, 511.]

(*h*) Nind v. Marshall, 1 Bro. & Bing. 319; 3 Moo. 703; Foord v. Wilson, 8 Taunt. 543; 2 Moo. 592; Barton v. Fitzgerald, 15 East, 530; 3 B. & Ad. 195; depended on particular circumstances; general rule the other way.

should or might at any time or * times thereafter, during the said term, have or lawfully claim any estate," &c., in the premises; *and that* free from incumbrances by the seller; and, moreover, for further assurance by the seller, his executors, and administrators, and all persons claiming by, from, under, or in trust for him or them. All the covenants, therefore, were restricted to the acts of the seller, except the covenant for quiet enjoyment, which in words expressly extended to all mankind. It was held by three judges against one, that the covenant for quiet enjoyment was restrained to persons claiming under the seller, and this case was distinguished from *Howell v. Richards*, on the ground that there the covenant respecting incumbrances, contained words as general as the words of the preceding covenant for quiet enjoyment, with one single exception, viz., the chief rent, which was not an act or default of the party, or of any claiming under him; this exception, therefore, confirmed the generality of all the other words.

7. In a still later case, it was recited in the conveyance that the seller was heir of A., and that A. had died intestate, and that the seller was seised in fee, and the covenants were: 1. notwithstanding any act by the seller or A. for good title; 2. and that notwithstanding any such act for right to convey; 3. and for quiet enjoyment against the seller, his heirs, &c., or any person claiming by, from, or under, or in trust for him or them or the said A. deceased; 4. and that free from incumbrances by the seller or the said A., or any other person or persons claiming by, from, or under, or in trust for them or either of them; and 5. for further assurance by the seller, his heirs, &c., and all persons claiming by, from, or under, or in trust for him or the said A. deceased. This seems a very plain case, but it was insisted that the recital bound the purchaser by estoppel from averring that the seller was not heir of A. (which point was not decided, but which it would be difficult to support), and that the covenant for quiet enjoyment was by construction confined to persons claiming by the acts of the seller or A., in consequence of the words of restriction at the beginning of the covenant. It was, of course, held that the covenant for quiet enjoyment was not thus restricted, and, therefore, that it extended to an eviction by the heir at law of A., the seller being illegitimate.⁽ⁱ⁾ The purchaser, we

(i) *Young v. Raincock*, 7 C. B. 310.

may observe, was not only entitled to covenants which would protect him against the title of the true heir; but the covenants were technically drawn and distinct, and the covenant for quiet enjoyment expressly extended to persons claiming under A., so that to cut down the operation of this covenant, most important words must have been struck out of the deed, which, if it had been done, would have rendered that covenant inconsistent with those which followed.

8. But where the *first* covenant is general, a subsequent limited *covenant will not restrain the generality of the preceding covenant, unless an express intention to do so appear, or the covenants be inconsistent, or as expressed by the court in a case quoted below, unless there appear something to connect the general covenant with the restrictive covenant, or unless there are words in the covenant itself amounting to a qualification. *(k)* In *Gainsford v. Griffith*, *(l)* on an assignment of a leasehold estate, the vendor covenanted that the lease was a good, certain, perfect and indefeasible lease in the law, and so should remain during the residue of the term, and that the purchaser, his executors, administrators, and assigns, should quietly enjoy the premises without any let, denial, &c., by the vendor, his executors, or assigns; and acquitted or otherwise saved harmless of all incumbrances committed by the vendor. The generality of the preceding covenant was held not to be restrained by the latter covenant, for one covenant went to the *title* and the other to the *possession*. *(m)* So in *Hesse v. Stevenson*, *(n)* where, on an assignment of certain shares of a patent right, the assignor covenanted, that he had good right, &c., to convey the shares, and that he had not by any means, directly or indirectly, forfeited any right or authority he ever had or might have had over the same, it was decided that the generality of the first covenant was not restrained by the latter covenant; the omission of the words "for and notwithstanding any act by him done to the contrary," was considered almost of itself decisive.

9. In *Smith v. Compton*, *(o)* the deed was a common convey-

(k) *Smith v. Compton*, *inf.*

(m) *Norman v. Foster*, 1 Mod. 191.

(l) 1 Saund. 58; 1 Sid. 328; 2 Bos. & Pul. 23, 25; 1 Bro. & Bing. 331; 3 Moo. 723; *Martyn v. M'Namara*, 4 Dru. & War. 411.

[See *Atty. Gen. v. Purmort*, 5 Paige, 620.]

(n) 3 Bos. & Pul. 565.

(o) 3 B. & Ad. 189, overruling *Milner v. Horton*, M'Clel. 647.

ance under a power, the creation of which was recited in the usual way. The covenants by the seller were, 1. that the power was in full force; 2. and that he had good right to appoint and convey; 3. and further for quiet enjoyment against the seller, or any person or persons claiming or to claim by, from, or under, or in trust for him; 4. and that free from incumbrances made by the seller, or any other person or persons claiming or to claim by, from, through, under, or in trust for him; and 5. for further assurance by the seller, and all persons claiming or to claim by, from, or under, or in trust for him; and it was determined that the second covenant for right to convey was absolute and not qualified by the subsequent covenants.

10. And as, on the one hand, a subsequent limited covenant does not restrain a preceding general covenant, so, on the other, a preceding general covenant will not enlarge a subsequent limited covenant.^(o¹) Where (*p*) a person seised in fee under letters patent conveyed the estate to a purchaser, reciting the grant from the *crown, and the title was deduced from the grantee to the vendor, who covenanted, 1. that he was seised in fee; 2. had power to convey; and 3. that there was no reversion in the crown, *notwithstanding any act done by him*; it seems to have been decided that the restrictive words to the last covenant did not extend to the two preceding ones; the court presuming the intention to be that the vendor should enter into an absolute covenant for his seisin in fee in all cases but one, namely, that he should not be liable on the objection of a reversion in the crown, unless that reversion was so vested by his own act.^(q)

11. Where the covenants are of divers natures, and concern different things, restrictive words added to one shall not control the generality of the others, although they all relate to the same

(o¹) [General implied covenants are qualified and restrained by express covenants of a more limited character. *Crouch v. Fowle*, 9 N. H. 219; *Kent v. Welch*, 7 John. 258; *Vanderkarr v. Vanderkarr*, 11 John. 122; *Sumner v. Williams*, 8 Mass. 201; *Blair v. Hardin*, 1 Marsh. 232; *Roebuck v. Dupuy*, 2 Ala. 535; *Frost v. Raymond*, 2 Caines, 188; *Weiser v. Weiser*, 5 Watts, 279; 4 Kent (11th ed.), 469, 473. But if not inconsistent, express and

implied covenants may exist together in the same deed. *Gates v. Caldwell*, 7 Mass. 68; *Kent v. Welch*, 7 John. 258. But in New York it is provided by statute that no covenant shall be implied in any conveyance of real estate whether such conveyance contain special covenants or not. 4 Kent (11th ed.), 469, 470.]

(p) *Trenchard v. Hoskins*, Winch, 91; 1 Sid. 328; 2 Bos. & Pul. 19.

(q) 2 Bos. & Pul. 25.

land.(*r*) Thus, where A. covenanted that he was seised in fee notwithstanding any act done by him, and that the lands were of a certain annual value; the latter was holden to be an absolute covenant, that the lands were of the stated value.(*s*)

12. A covenant "that lands were of the value of 1,000*l. per annum*, and so should continue, notwithstanding any act done or to be done by the covenantor," was holden to be only a covenant that the covenantor had not lessened the value.(*t*)

13. This subject must not be closed without observing, that if general covenants are entered into contrary to the intention of the parties, equity will, on sufficient proof, correct the mistake in the same manner as errors are corrected in marriage articles, and will relieve against any proceedings at law upon the covenants, as they originally stood.(*u*)

SECTION IV.

OF THE REMEDY UNDER COVENANTS FOR TITLE.

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| <ol style="list-style-type: none"> 1. Action for damages on eviction. 2. But no relief unless within the covenant, or fraud. 3. What is a breach. 4. Damages where copyhold and not freehold. 5. Breach although no estate passed. 6. Purchaser may wait till eviction. 7. Damages under covenant for further assurance. 8. Interest. 9. Purchaser's remedy under covenants where he has mortgaged. 10. Improvements and buildings. 11. Contingent incumbrance. * 12. Effect of want of notice to seller from purchaser of adverse suit. 13. Bankruptcy, &c., no bar of covenant for title. — Action against devisees. 14. Specific performance of covenant for further assurance. | <ol style="list-style-type: none"> 15. Seller bound to confirm, although breach of a covenant by purchaser. 16. Duplicate of conveyance: covenant to produce deeds. 17. Relief against assignees. 18. Relief in equity against covenants for title. 19. Judgments, &c. 20. Limited time for further assurance. 21. Unnecessary act cannot be required. 22. Costs to be tendered. 23. Assurance to be devised by counsel or party. — What time is allowed for the execution of a further assurance. 24. Bond cannot be required. 25. } What covenants may be required in 27. } assurance. 26. Where a trustee conveys by way of further assurance. |
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(*r*) 3 Lev. 47; *Crossfield v. Morrison*, 13 Jur. 565.

(*s*) *Hughes v. Bennett*, Cro. Car. 495; 1 Jones, 403; *Crayford v. Crayford*, Cro. Car. 106.

(*t*) *Rich v. Rich*, Cro. Eliz. 43.

(*u*) *Coldcott v. Hill*, 1 Ch. C. 15; 1 Sid. 328; *Fielder v. Studly*, Rep. temp. Finch, 90; 2 Bos. & Pul. 26; 3 Bos. & Pul. 575, *supra*.

1. If a purchaser be evicted, and the eviction is within the covenant, he may of course bring an action at law for damages.

2. But, as we have already seen, unless the eviction be within the covenant, or there was a fraudulent concealment of the defect, a purchaser cannot recover the purchase money in case of eviction, either at law or in equity.(a)

3. A general covenant that the seller is seised or possessed of the estate for the interest granted, is broken immediately after the execution of the deed if the seller has not the fee or estate granted,(b) and the purchaser need not wait till he is evicted; (b¹) but this is not peculiar to a general covenant, for a limited covenant would likewise be at once broken if the title were bad within the limits of the covenant. And the purchaser may negative the alleged seisin or possession of the seller without stating affirmatively what estate he has.(c) Of course the same observations apply to a covenant for right to convey.(d) But a covenant for quiet enjoyment affords no right of action until a disturbance: (d¹) the erection of a gate which obstructs the cove-

(a) *Sup.* c. 13, s. 2; [p. 549, note.]

(b) *Salmon v. Bradshaw*, Cro. Jac. 304. [See *ante*, 577, note (g); 4 Kent (11th ed.), 471; *Swasey v. Brooks*, 30 Vt. 692; *Tapley v. Labeaume*, 1 Missou. 552; *Catlin v. Hurlburt*, 3 Vt. 407; *Hacker v. Stover*, 8 Greenl. 232.]

(b¹) [To constitute a breach of the covenant of seisin and of good right to convey, an eviction is not necessary. *Mitchell v. Hazen*, 4 Conn. 495; *Pollard v. Dwight*, 4 Cranch, 430; *Pringle v. Witten*, 1 Bay, 256; *Mackey v. Collins*, 2 Nott & McC. 186; *Lot v. Thomas*, 1 Penn. 407; *M'Carty v. Leggett*, 3 Hill, 134; *Logan v. Moulder*, 1 Pike, 313; *Bird v. Smith*, 3 Eng. 368. In an action for breach of this covenant, it is not admissible in evidence, that the grantor obtained a good title after the conveyance but before suit; *M'Carty v. Leggett*, 3 Hill, 134; *Morris v. Phelps*, 5 John. 49; unless the title subsequently obtained by the grantor inures to the benefit of the grantee under the covenant of warranty. In this latter case the grantee would hold

by estoppel, and could not retain the seisin of the land and recover back the consideration paid for it besides. *Baxter v. Bradbury*, 20 Maine, 260. Nor could he elect to reject the title thus acquired and recover the consideration money. *Baxter v. Bradbury*, *supra*.]

(c) *S. C. Muscot v. Ballet*, Cro. Jac. 369. [See *Martin v. Baker*, 5 Blackf. 232; 4 Kent (11th ed.), 379; *Sedgwick v. Hollenback*, 7 John. 376; *Greenby v. Wilcocks*, 2 John. 1; *Marston v. Hobbs*, 2 Mass. 433; *Bender v. Fromberger*, 4 Dall. 436; *Pollard v. Dwight*, 4 Cranch, 421.]

(d) *Chamberlin v. Ewer*, 2 Buls. 11; *Nash v. Aston*, Skin. 42; *King v. Jones*, 5 Taunt. 418.

(d¹) [*Boothby v. Hathaway*, 20 Maine, 251; *Kelly v. Dutch Church*, 2 Hill, 105; *St. John v. Palmer*, 5 Hill, 599; *Waldron v. McCarthy*, 7 John. 471; *Kortz v. Carpenter*, 5 John. 120; *Whitbeck v. Cook*, 15 John. 483; *Van Slyck v. Kimball*, 8 John. 198; *Webb v. Alexander*, 7 Wend. 281; *Coble v. Wellborn*, 2 Dev. 388; *Girst v. Hodges*, 3 Dev. 200; *Martin v.*

nantee's necessary right of way; whether set up by right or by wrong, would be a breach of the latter covenant,^(e) for in either case an obstruction ought not to be erected there. As to the covenant that the estate is free from incumbrances, which is always connected with the covenant for quiet enjoyment, there is an obvious distinction between a covenant that the estate is free from incumbrances, which is not the form of the common covenant, and which would be broken as soon as made if there were any incumbrance; ^(f) and a covenant like that commonly entered into by the vendors that the purchaser shall enjoy free from incumbrances, which so long as he do the covenant would not be broken.^(g)

Martin, 1 Dev. 313; Kerr v. Shaw, 1 John. 236; Fowler v. Poling, 6 Barb. 165; 2 Greenl. Ev. § 243; *ante*, 600; Rawle Cov. (3d ed.) 180 *et seq.*; Wilder v. Ireland, 8 Jones Law (N. Car.), 85.]

(e) Andrews v. Paradise, 8 Mod. 318; Morris v. Edgington, 3 Taunt. 24; Plant v. James, 5 B. & Ad. 794; Kidder v. West, 3 Lev. 167. [An outstanding right of way across the whole or any part of premises conveyed by deed, constitutes a breach of a general covenant of warranty contained in the deed. Russ v. Steele, 40 Vt. 310; see Clark v. Swift, 3 Met. 390; Wilson v. Cochran, 48 Penn. St. 107.]

(f) Harrington v. Rydear, 1 Lev. 92; Moo. 249, pl. 393. [See *ante*, 577, note (g); Clark v. Swift, 3 Met. 390; Heath v. Whidden, 24 Maine, 383; Potter v. Taylor, 6 Vt. 676; Richardson v. Dorr, 5 Vt. 9; Prescott v. Trueman, 4 Mass. 629; Chapel v. Bull, 17 Mass. 220; Garrison v. Sandford, 7 Halst. 261; such as a mortgage, Tufts v. Adams, 8 Pick. 547; Funk v. Voneida, 11 Serg. & R. 109; Stewart v. Drake, 4 Halst. 139; Wyman v. Ballard, 12 Mass. 304; or a right of way, Clark v. Swift, 3 Met. 390; Harlow v. Thomas, 15 Pick. 68; Mitchell v. Warner, 5 Conn. 497; so an inchoate right of dower, Porter v. Noyes, 2 Greenl. 22; Shearer v. Ranger, 22 Pick. 447. But it is not a breach of the covenant against incumbrances, that the grantor holds the land

upon condition to erect a dwelling-house thereon within a certain time, the house having been erected within the time, though after his conveyance. Estabrook v. Smith, 6 Gray, 572. It seems to be settled in some States that the existence of a public highway over the land conveyed is a breach of the covenant against incumbrances. Haynes v. Young, 36 Maine, 557; Butler v. Gale, 27 Vt. 742; Rawle Cov. (3d ed.) 118, 119; Hubbard v. Norton, 10 Conn. 431; Pritchard v. Atkinson, 3 N. H. 335; Herriok v. Moore, 19 Maine, 313; Kellogg v. Ingersoll, 2 Mass. 101. So is the existence of a right of way for a railroad, though known to the grantee at the time of conveyance. Barlow v. McKinley, 24 Iowa, 69. But there is a conflict of authority on this point, see Rawle Cov. (3d ed.) 115 *et seq.*; Patterson v. Arthurs, 9 Watts, 152; Dobbins v. Brown, 12 Penn. St. 80; Bailey v. Miltenberger, 31 Penn. St. 41; *ante*, 602, note; Wilson v. Cochran, 46 Penn. St. 229. In Kutz v. McCune, 22 Wis. 628, it was held that a general covenant against incumbrances does not embrace an easement obviously and notoriously affecting the physical condition of the premises at the time of sale; as a mill-pond flowage over forty acres thereof.]

(g) Vane v. Ld. Barnard. Gilb. 7; [Rawle Cov. (3d ed.) 109 *et seq.*]

* 4. If the estate was sold as freehold, with a general covenant that the seller was seised in fee, and it prove to be copyhold, the measure of damages will be according to the rate that the country values fee simple land more than copyhold.(*h*)

5. It is immaterial that no estate passes by the conveyance, for if a man grant to another his manor of Dale, in which he has nothing, and covenants that he had good right to grant this, this clearly is a breach of covenant.(*i*)

6. And the covenantee may without prejudice to his remedy wait till he is evicted, although the breach is the want of title or right to convey, and the eviction is only a consequential damage.(*j*) If the only covenant is for quiet enjoyment, the purchaser *must* wait until he is evicted.

7. Where the covenant is for further assurance, if the seller will not convey, the purchaser may recover the whole value of the estate,(*k*) although generally it is wise to wait until the ultimate damage is sustained, for otherwise he could not recover the whole value;(*l*) but where the title is defective, a purchaser

(*h*) *Gray v. Briscoe*, Noy, 142 (*d. not*).

(*i*) Per Williams J., 2 Buls. 12 (2d number). [See *ante*, 577, note.]

(*j*) *King v. Jones*, 5 Taunt. 418.

(*k*) Per Mansfield C. J., 5 Taunt. 426.

(*l*) Per Heath J., 5 Taunt. 428. [In regard to the damages to be recovered for breach of the covenants in a deed of real estate, Mr. Chancellor Kent remarks: "The buyer, on the covenant of seisin, recovers back the consideration money and interest, and no more. The interest is to counter-vail the claim for mesne profits, to which the grantee is liable, and is, and ought to be, commensurate in point of time with the legal claim to mesne profits. The grantor has no concern with the subsequent rise or fall of land by accidental circumstances, or with the beneficial improvements made by the purchaser, who cannot claim any damages, either for the improvements or the increased value. This appears to be the general rule in this country." 4 Kent (11th ed.), 475; *Staats v. Ten Eyck*, 3 Caines, 111; *Pitcher v. Livingston*, 4 John. 1; *Bender v. Fromberger*,

4 Dall. 441; *Bennet v. Jenkins*, 13 John. 50; *Marston v. Hobbs*, 2 Mass. 433; *Caswell v. Wendell*, 4 Mass. 108; *Smith v. Strong*, 14 Pick. 128; *Sterling v. Peet*, 14 Conn. 245; *Weiting v. Nissley*, 13 Penn. St. 655; *Wilson v. Forbes*, 2 Dev. 30; *Logan v. Moulder*, 1 Pike, 323; *Seamore v. Harlan*, 3 Dana, 415; *Tapley v. Labeaume*, 1 Missou. 552; *Martin v. Long*, 3 Missou. 391; *Clark v. Parr*, 14 Ohio, 121; *Buckmaster v. Grundy*, 1 Scam. 312, 313; *Earle v. Middleton*, 1 Cheves Law & Eq. 127; *Caulkins v. Harris*, 9 John. 324; *Henning v. Withers*, 3 Brevard, 458; *Bingham v. Weidewax*, 1 Comst. 509; *Greene v. Tallman*, 20 N. Y. 191; *Burton v. Reeds*, 20 Ind. 87; *Willson v. Willson*, 25 N. H. 234; *Mitchell v. Haren*, 4 Conn. 459; *Swafford v. Whipple*, 3 Greene (Iowa), 264; *Nichols v. Walter*, 8 Mass. 243. In New York the rule is not to compute interest in such a case for more than six years back. *Staats v. Ten Eyck*, 3 Caines, 111; *Caulkins v. Harris*, 324; *Bennet v. Jenkins*, 13 John. 50. No such limitation, however, has ever been sanc-

would not be bound to wait, but might bring his action of covenant, and if necessary offer to reconvey the interest or title actually vested in him.⁽¹⁾

tioned in Massachusetts. *Wilde J.*, in *Whiting v. Dewey*, 15 Pick. 428, 435. The rule of damages above stated is not inflexible. It will yield to peculiar circumstances. See *Wilde J.*, in *Whiting v. Dewey*, 15 Pick. 428; *Baxter v. Bradbury*, 20 Maine, 260; *Spring v. Chase*, 22 Maine, 505; *Leland v. Stone*, 10 Mass. 459; *Flint v. Steadman*, 36 Vt. 210. In *Parker v. Brown*, 15 N. H. 176, *Parker C. J.*, said: "The measure of the damages for a breach of the covenant of seisin is the value of the land at the time of the conveyance, which may be determined by the consideration paid. This was stated to be the rule in this case, and it is not controverted that the consideration expressed in the deed was the evidence of value." *Rawle Cov.* (3d ed.) 60 *et seq.*, 65; *Marston v. Hobbs*, 2 Mass. 433; *Smith v. Strong*, 14 Pick. 128; *Tapley v. Lebeaum*, 1 Missou. 550; *Cummins v. Kennedy*, 3 Litt. 118; *Wilson v. Forbes*, 2 Dev. 30. Where, however, the consideration does not appear, the value of the land must be ascertained from other evidence; *Rawle Cov.* (3d ed.) 65 *et seq.* 69; *Smith v. Strong*, 14 Pick. 128; *Byrnes v. Rich.* 5 Gray, 519. Evidence is admissible to show the actual consideration to be either greater or less than that expressed in the deed, according to the truth, for the purpose of increasing or diminishing the damages. *Rawle Cov.* (3d ed.) 68 *et seq.*, and cases cited; *Bronson J.*, in *Green-vault v. Davis*, 4 Hill, 643; *Bingham v. Weidewax*, 1 Comst. 509; see *McCrea v. Purmopt*, 16 Wend. 460; *Bolles v. Beach*, 2 Zabrisk. 680. Where there is a breach of covenant against incumbrances, the amount fairly paid to remove the incumbrance, with interest from the payment, is the measure of damages. *Brooks v. Moody*, 20 Pick. 474; *Comings v. Little*, 24 Pick. 266; *Thayer v. Clemence*, 22 Pick. 490; *Norton v. Babcock*, 2 Met.

510; *Prescott v. Trueman*, 4 Mass. 627; *Delavergne v. Norris*, 7 John. 358; *Hall v. Dean*, 13 John. 105; *Harlow v. Thomas*, 15 Pick. 66; *Chapel v. Bull*, 17 Mass. 213; *Hurd v. Hall*, 12 Wis. 112; *Bailey v. Scott*, 13 Wis. 618; *Fawcett v. Woods*, 5 Iowa, 400; *Lawless v. Collier*, 19 Missou. 480; *Burk v. Clements*, 16 Ind. 132; *Lewis v. Harris*, 31 Ala. 689; *Loomis v. Bedel*, 11 N. H. 74. The purchaser may recover the amount paid by him to free the estate, although paid after suit. *Kelly v. Low*, 18 Maine, 244; see *Preble v. Baldwin*, 6 Cush. 549; *Leffingwell v. Elliott*, 10 Pick. 204; *Brooks v. Moody*, 20 Pick. 414. This, however, must never exceed the consideration money and interest; *Foote v. Burnet*, 10 Ohio, 317; or the value of the estate, where that is the rule of damages. *Norton v. Babcock*, 2 Met. 510. But if the incumbrance remain and consist of mortgages, attachments, and such liens on the estate conveyed as do not interfere with the enjoyment of it by covenantee, he can recover only nominal damages. *Parsons C. J.*, in *Prescott v. Trueman*, 4 Mass. 630; *Morton J.* in *Harlow v. Thomas*, 15 Pick. 69; *Wyman v. Ballard*, 12 Mass. 304; *Tufts v. Adams*, 8 Pick. 547; *Richardson v. Dorr*, 5 Vt. 9; *Delavergne v. Norris*, 7 John. 358; *Dim-*

(1) [A. holding a farm under a deed of warranty from B. was sued by C. to recover her dower therein; and during the pendency of her suit, A. sued B. on the covenant in his deed against incumbrances, and had judgment for nominal damages. After C.'s recovery of her dower and the extinguishment of it by purchase by A., he brought another action against B. on the covenant of warranty, and it was held, that the former judgment was no bar to a recovery in the latter suit. *Donnell v. Thompson*, 1 Fairf. 170; *Rawle Cov.* (3d ed.) 74, 75.]

8. In one case, where the purchaser obtained only a mortgage title, and was compelled to reconvey upon payment to him of

mick v. Lockwood, 10 Wend. 149; Collier v. Gamble, 10 Missou. 467; Willets v. Burgess, 34 Ill. 494; Green v. Tallman, 20 N. Y. 191; Stowell v. Bennett, 34 Maine, 422; Herrick v. Moore, 19 Maine, 313. If, however, the incumbrances are of a permanent nature, like easements, such as the covenantee cannot remove, he should recover a just compensation for the real injury resulting from their continuance. Morton J., in Harlow v. Thomas, 15 Pick. 69; Hubbard v. Norton, 10 Conn. 422, 435; Gilbert v. Bulkley, 5 Conn. 262; Porter v. Bradley, 7 R. I. 538; Batchelder v. Sturgis, 3 Cush. 201; Willson v. Willson, 25 N. H. 229. Where the breach of covenant arises from an eviction of a part only of the land purchased, the covenantee will recover under the covenant of seisin such a proportion of the whole consideration and interest as the value of that part bears to the value of the whole. Ela v. Card, 2 N. H. 175; Hubbard v. Norton, 10 Conn. 422; Morris v. Phelps, 5 John. 49; Guthrie v. Pugsley, 12 John. 126; Dimmick v. Lockwood, 10 Wend. 142; King v. Pyle, 8 Serg. & R. 166; 4 Kent (11th ed.), 477. Where land was attached when sold, and an execution recovered in the suit was extended on part of it, the extent was held to be an eviction; the appraisal the value; and the damages, such appraised value with interest from the extent. Barrett v. Porter, 14 Mass. 143.

On the covenant of warranty, the measure of damages in Massachusetts, Maine, Vermont, Connecticut, is the value of the land at the time of the eviction, without regard to the consideration in the deed. Gore v. Brazier, 3 Mass. 523; Parker J. in Caswell v. Wendell, 4 Mass. 108; Bigelow v. Jones, 4 Mass. 512; Wyman v. Ballard, 12 Mass. 304, 306; Norton v. Babcock, 2 Met. 518; White v. Whitney, 3 Met. 89; Hardy v. Nelson, 27 Maine, 525; Strong v. Shumway, D. Chip. (Vt.) 111; Park v.

Bates, 12 Vt. 387; Pitkin v. Leavitt, 13 Vt. 379; Keeler v. Wood, 30 Vt. 242; Cushman v. Blanchard, 2 Greenl. 266; Swett v. Patrick, 3 Fairf. 9; Sterling v. Peet, 13 Conn. 245. See, for Louisiana, Bissell v. Erwin, 13 La. 143. Interest will be allowed from the time of the eviction, and where there has been an eviction by judgment of law, the expenses of defence to the suit, by which the eviction has been effected. Hardy v. Nelson, 27 Maine, 525; Pitkin v. Leavitt, 13 Vt. 379; Bigelow v. Jones, 4 Mass. 512; Rawle Cov. (3d ed.) 98-104. Counsel fees were included in the case of Swett v. Patrick, 3 Fairf. 9; so in Staats v. Ten Eyck, 3 Caines, 115; in Rickert v. Snyder, 9 Wend. 423; and such expenses have been held to be recoverable in many other cases. Hardy v. Nelson, 27 Maine, 525; Gennings v. Norton, 35 Maine, 314; Haynes v. Stevens, 11 N. H. 28; Kingsbury v. Smith, 13 N. H. 109, 124, 125; Drew v. Towle, 30 N. H. 538; Pitkin v. Leavitt, 13 Vt. 379; Keeler v. Wood, 30 Vt. 658; McAlpin v. Woodruff, 11 Ohio St. 120; Allen v. Blunt, 2 Wood. & M. 121; Robertson v. Lemon, 2 Bush. (Ky.) 301; Harding v. Larkin, 41 Ill. 413; Kennison v. Taylor, 18 N. H. 220. But counsel fees were excluded in the case of Leffingwell v. Elliott, 10 Pick. 204. See Rawle Cov. (3d ed.) 101-104; Holmes v. Sinnickson, 3 Green, 313. When the grantee has been evicted by a paramount title and has extinguished that title, the measure of damages will be the amount paid by him for that purpose as well after as before the commencement of the suit, together with interest and a reasonable compensation for the trouble and expense to which he may have been put in procuring such extinguishment, exclusive of fees for advice and services of counsel. Leffingwell v. Elliott, 10 Pick. 204; Wetmore v. Green, 11 Pick. 462; White v. Whitney, 3 Met. 81; Sprague v. Baker, 17 Mass. 586; Kelly v.

the mortgage money, the jury gave him as damages a sum sufficient to make up the residue of the purchase money and interest

Low, 18 Maine, 244; *Gardner v. Niles*, 16 Maine, 279; *Loomis v. Bedel*, 11 N. H. 74; *Donahoe v. Emery*, 9 Met. 63; *Eastabrook v. Smith*, 6 Gray, 572; *Thayer v. Clemence*, 22 Pick. 490; *Spring v. Chase*, 22 Maine, 505; *Tanner v. Livingston*, 12 Wend. 83; *Hurd v. Hall*, 12 Wis. 112; *Bailey v. Scott*, 13 Wis. 618; *Lawless v. Collier*, 19 Missou. 480; *Fawcett v. Woods*, 5 Iowa, 400; *Jackson v. Hanna*, 8 Jones Law (N. Car.), 188. The above rule, however, supposes that the sum paid to extinguish the paramount title does not exceed the value of the estate. *White v. Whitney*, 3 Met. 81. The amount to be recovered by the grantee, who has been in the possession and actual occupation of the premises, and has purchased an outstanding paramount title, is not affected by proof that the rents and profits are more or less than the interest on the consideration originally paid. *Spring v. Chase*, 22 Maine, 505. The value of the land at the time of the eviction may greatly exceed the value and price of the land at the time of the sale; but the rule above stated giving the value at the time of eviction was adopted in the first settlement of the country, when the value of the land consisted chiefly in the improvements made by the occupants; and if, on ouster, the warranty would not have secured to them the value of these improvements, they could have derived little benefit from it. *Parsons C. J. in Gore v. Brazier*, 3 Mass. 523, 545; 4 Kent (11th ed.), 475, 476. In other States, on a total failure of title, the measure of damages even on the covenant of warranty is the value of the land at the execution of the deed; and the evidence of that value is the consideration money, with interest and costs. NEW YORK: *Staats v. Ten Eyck*, 3 Caines, 111; *Pitcher v. Livingston*, 4 John. 1; *Bennett v. Jenkins*, 13 John. 50. PENNSYLVANIA: *Bender v. Fromberger*, 4 Dall. 441; *McCure v. Gamble*, 27 Penn. St. 288; *Hertzhog v. Hertzhog*, 34 Penn. St. 418; *McNair v. Compton*, 35 Penn. St. 23; *Dumars v. Miller*, 34 Penn. St. 319; *Cox v. Henry*, 32 Penn. St. 18; *Brown v. Dickerson*, 12 Penn. St. 372. VIRGINIA: *Stout v. Jackson*, 2 Rand. 132; *Threlkeld v. Fitzhugh*, 2 Leigh, 451; see *Mills v. Bell*, 3 Call, 326; *Nelson v. Mathews*, 2 Hen. & M. 164; *Lowther v. Commonwealth*, 1 Hen. & M. 202; *Crenshaw v. Smith*, 5 Munf. 415; *Wilson v. Spencer*, 11 Leigh, 261. NORTH CAROLINA: *Phillips v. Smith*, 1 N. Car. Law Rep. 475; *Wilson v. Forbes*, 2 Dev. 30. SOUTH CAROLINA: *Henning v. Withers*, 3 Brevard, 458; *Ware v. Weathnall*, 2 McCord, 413; *Bond v. Quattlebaum*, 1 McCord, 584; *Liber v. Parsons*, 1 Bay, 19; *Pearson v. Davis*, 1 McMullan, 37; *Guerard v. Rivers*, 1 Bay, 265; *Witherspoon v. Anderson*, 3 Desaus. 245; *Earle v. Middleton*, 1 Cheves Law & Eq. 127. NEW HAMPSHIRE: *Loomis v. Bedel*, 11 N. H. 74; see *Nutting v. Herbert*, 35 N. H. 120; 37 N. H. 346; *Foster v. Thompson*, 41 N. H. 373; *Drew v. Towle*, 30 N. H. 531. OHIO: *Backus v. M'Coy*, 3 Ham. 211, 221; *Clark v. Parr*, 14 Ohio, 118; *Johnson v. Nyce*, 17 Ohio, 66; *Wade v. Comstock*, 11 Ohio St. 71; *Dustin v. Newcomer*, 8 Ohio, 49; *Foote v. Burnet*, 10 Ohio, 317. KENTUCKY: *Hanson v. Buckner*, 4 Dana, 253; *Cox v. Strode*, 2 Bibb, 272. MISSOURI: *Tapley v. Lebeaum*, 1 Missou. 552; *Martin v. Long*, 3 Missou. 391; *Coffman v. Huck*, 19 Missou. 435; *Tong v. Mathews*, 23 Missou. 437. ILLINOIS: *Buckmaster v. Grundy*, 1 Scam. 310; *McKee v. Brandon*, 2 Scam. 339. NEW JERSEY: *Stewart v. Drake*, 4 Halst. 139; *Morris v. Rowan*, 2 Harr. 304. TENNESSEE: *Elliot v. Thompson*, 4 Humph. 99; *Talbot v. Bedford*, 5 Hall's L. J. 330, cited in notes to *Duvall v. Craig*, 2 Wheat. 45, 61; *Shaw v. Wilkins*, 8 Humph. 647; *Hopkins v. Yowell*, 5 Yerg. 305. ARKANSAS: *Logan v. Moulder*, 1 Pike, 313. GEOR-

since he was evicted; and this was supported, as the plaintiff was entitled to recover damages for all the time passed during which he had been kept out of possession.^(m)

9. If the purchaser has made a mortgage, he cannot recover in an action against the seller on the covenants, but the seller would not be permitted to avail himself as against the purchaser of a dealing with or release by the mortgagee, for equity would allow the purchaser to bring an action against the seller for damages, and would prevent the seller from setting up as a defence the mortgage or the dealings with the mortgagee.⁽ⁿ⁾

10. In *Lewis v. Campbell* it was treated as a doubtful point whether in an action on a covenant for quiet enjoyment of an estate sold, the plaintiff who had been evicted could recover for his improvements and buildings.^(o) In a recent case,^(p) the master of the * rolls held that the measure of the damage sustained was the amount expended in the conversion of the land

GIA: *Davis v. Smith*, 5 Geo. 274; *Martin v. Gordon*, 24 Geo. 533; *Richardson v. Keerly*, 22 Geo. 62. TEXAS: *Hall v. York*, 22 Texas, 641; *Sutton v. Page*, 4 Texas, 142. IOWA: *Brandt v. Foster*, 5 Iowa, 287; see *Durbin v. Garrard*, 5 Monroe, 317; *Gridley v. Tucker*, 1 Freem. Ch. 209; *Harland v. Eastland*, *Hardin*, 590; *McKinney v. Watts*, 3 A. K. Marsh. 268. In addition to the consideration money and interest, the expenses of the grantee in defending the possession have been allowed. *Fernander v. Dunn*, 19 Geo. 497; *Willson v. Willson*, 25 N. H. 229; see, also, *Phipps v. Tarpley*, 31 Missou. 433; *Baxter v. Ryerss*, 13 Barb. 267; *House v. House*, 10 Paige, 158; *Blake v. Burnham*, 29 Vt. 437; *Smith v. Sprague*, 40 Vt. 43. Attorney's fees not taxable are not to be included in the costs. *Holmes v. Sinnickson*, 3 Green, 313. Where the eviction complained of is partial, the recovery is proportioned to the value of the part to which the title has failed. *Sedgwick Damages* (5th ed.) 182-184; *Morris v. Phelps*, 5 John. 49; *Cornell v. Jackson*, 3 Cush. 506; *Hunt v. Orwig*, 17 B. Mon. 73; *Beaupland v. McKean*, 28 Penn. St. 124; *Walker v. Johnson*, 8 Eng. 522;

Kerby v. Richardson, 17 Geo. 602; see *Griffin v. Reynolds*, 17 How. U. S. 609; *Furniss v. Ferguson*, 15 N. Y. 437; *Hoot v. Spade*, 20 Ind. 326; *Phillips v. Reichert*, 17 Ind. 120; *Wiley v. Howard*, 15 Ind. 169; *Major v. Dunnavant*, 25 Ill. 262; *Brandt v. Foster*, 5 Iowa, 287; *Jackson v. Hanna*, 8 Jones Law (N. Car.), 188. The recovery of damages upon the covenant of seisin, to the full amount of the consideration money and interest, operates of itself to revest the title in the covenantor, or give him the right of possession as against the covenantee, and estop the latter from claiming any title or interest in the premises, under or by virtue of any subsequent conveyance to the covenantor. *Noonan v. Ilsley*, 21 Wis. 138; *Park v. Cheek*, 4 Cold. (Tenn.) 20.]

(m) *King v. Jones*, 5 Taunt. 418; *Anderton v. Arrowsmith*, 2 Per. & Dav. 408; *Ware v. Bickerton*, 19 L. J. N. S. 254.

(n) *Thornton v. Court*, 3 De G., M. & G. 293. [See *Rawle Cov.* (3d ed.) 360, 361.]

(o) 8 Taunt. 715.

(p) *Bunny v. Hopkinson*, 6 Jur. N. S. 187; 29 L. J. N. S. 93.

to the purpose for which it was purchased. Houses had been built; all, therefore, that had been laid out in the erection of the houses must be reimbursed.

11. Where a man agrees to take a covenant against incumbrances and there is a contingent incumbrance, if an action at law be brought upon the covenant there would not be recovered twopence damages till a breach, which possibly may never happen.(q)

12. A purchaser is not bound to give notice of an adverse suit to the covenantor; (q¹) but if he compromise it, may recover the whole sum paid and his costs between solicitor and client, if the claim was within the covenant.(q²) But the other party will be at liberty to prove that the purchaser made an improvident bargain, and that the defendant might have obtained better terms if the opportunity had been given to him.(r)

(q) Per *Ld. Cowper*, *Gilb. E. R.* 7; see *Randall v. Roper*, 4 *Jur. N. S.* 662, upon a warranty on sale of goods.

(q¹) [*Chapman v. Holmes*, 5 *Halst.* 10; *King v. Kerr*, 5 *Ham.* 156; *Rawle Cov.* (3d ed.) 237, 238. The covenantee is not bound to defend after notice to the covenantor and refusal on his part to defend. *Jackson v. Marsh*, 5 *Wend.* 44. In *Miner v. Clark*, 15 *Wend.* 425, it was held by the court that the notice in such case need not be in writing. See *Rawle Cov.* (3d ed.) 229, 230.]

(q²) [*Ante*, 611, note. An adverse equitable claim to land is not regarded as an incumbrance. *Marple v. Scott*, 41 *Ill.* 50.]

(r) *Smith v. Compton*, 3 *B. & Ald.* 407; see *Duffield v. Scott*, 3 *T. R.* 374; *Short v. Kelloway*, 11 *Ad. & El.* 28. [*Ante*, 611, note. It is said by Mr. Rawle, in his excellent work of *Covenants for Title* (3d ed.), p. 226, that "it is well settled in most, if not all of the United States, that in general, upon suit being brought upon a paramount claim against one who is entitled to the benefit of a covenant of warranty, the latter can, by giving proper notice of this action to the party bound by that covenant and requiring him to defend it relieve himself from the burden of being

obliged afterwards to prove, in the action on the covenant, the validity of the title of the adverse claimant," and to this he cites numerous authorities. After a careful examination and review of the cases upon the subject, the learned author concludes by saying, "On the subject of notice to the covenantor of the adverse proceedings, the following points appear to be settled by the weight of authority: First. The notice must be distinct and unequivocal, and expressly require the party bound by the covenant to appear and defend the adverse suit. Secondly. If such notice appear upon the record of that suit, or if the covenantor be made a party to it, the court will, in the action on the covenant, be authorized to instruct the jury that the recovery in that suit is conclusive upon and binds the defendant in the action on the covenant. Thirdly. If the notice do not thus appear on the record, the question of conclusiveness of the judgment will depend upon the belief of the jury as to the reception of the notice. Fourthly. If the record of the adverse suit does not exhibit on its face the title under which the recovery was had, the plaintiff in the action on the covenant must, notwithstanding proper notice has been given, prove that such title did no,

13. An action for breach of a covenant for title (s) will not be barred by the bankruptcy and certificate of the covenantor, although the cause of action accrued before the bankruptcy. And now an action of covenant will lie against a devisee; (t) and damages under a breach of covenant for quiet enjoyment after the death of the covenantor are a debt of his within a trust by his will to pay all the just debts which he should owe at his death.(u) But damages recovered in an action for breach of a covenant running with the land, are not to be considered as part of the inheritance, and therefore a tenant for life recovering would hold the damages for his own benefit, and the remainderman would be driven to a new action.(v)

14. If the title prove bad, and *the defect can be supplied by the vendor*, the purchaser may file a bill in equity for a specific performance of the covenant for further assurance. And a vendor, who has sold a bad title, will, under a covenant for further assurance, be compellable to convey any title which he may have acquired since the conveyance, although he actually purchased such title for a valuable consideration.(x) But after a conveyance executed, a bill cannot be filed for compensation.

15. If the purchaser has broken a covenant in the deed, yet if that * and the covenant for further assurance were not dependent

accrue subsequently to the deed to himself. Fifthly. If no notice has been given, the record of such adverse suit is not even *prima facie* evidence that the title was a paramount one, though it may under some circumstances be evidence of eviction; and Sixthly. It is not indispensable to the recovery on the covenant, that notice of the adverse suit shall have been in any way given." Rawle Cov. (3d ed.) 239, 240. In Vermont, where a covenantee brings suit upon the title conveyed to him by his vendor, it has been held, that a notice duly given by him to the vendor, being the covenantor, would have the effect of making the result of the suit conclusive upon the covenantor; Pitkin v. Leavitt, 13 Vt. 379; Brown v. Taylor, 13 Vt. 637; and the same view has been taken in cases decided in Georgia and Texas;

Gragg v. Richardson, 25 Geo. 570; White v. Williams, 13 Texas, 258.]

(s) Hammond v. Toulmin, 7 T. R. 612; Mills v. Auriol, 1 H. Bl. 433; see and consider the provisions of the two last bankrupt acts.

(t) Wilson v. Knubley, 7 East, 128; Farley v. Briant, 3 Ad. & El. 839; 1 W. 4, c. 47, s. 3; 3 & 4 Will. 4, c. 104; 2 My. & Cra. 708; 7 Sim. 546; Spackman v. Timbrell, 8 Sim. 253; see Dilkes v. Broadmead, 2 Gif. 113; Hamer's case, 3 De G. & Sm. 279.

(u) Birmingham v. Burke, 2*J. & L. 699; Morse v. Tucker, 5 Hare, 79; Cox v. King, 9 Beav. 530; Norman v. Stiby, 9 Beav. 560.

(v) Noble v. Cass, 2 Sim. 343.

(x) Taylor v. Debar, 1 Ch. C. 274; 2 Ch. C. 212; Seabourne v. Powell, 2 Ver. 11; ch. 23.

covenants, the seller will be compelled to make good the conveyance, and be left to his remedy under the purchaser's covenant.(y) If the title is bad, and the loss is a claim on the assets, there may be an issue to ascertain the damages.(z)

16. It seems that, under a covenant for further assurance, a purchaser may require a duplicate of the conveyance to be executed to him, in case he is compelled to part with the original to a purchaser from him of part of the estate; (a) but it may be doubted whether he can require a covenant to produce the title deeds if the purchase was completed without such a covenant.(b)

17. So if the vendor become bankrupt, the purchaser may call upon the assignees to execute further assurances, although the vendor was only tenant in tail, and did not bar the entail.(c)

18. But if the original contract was not fit to be executed by equity, the court will not interfere in behalf of the purchaser, but leave him to his remedy at law.(d) And if the title prove bad, and the purchase was made at a great undervalue, equity will relieve the vendor against an action on the covenants for title, allowing the purchaser his purchase money, with interest only, he discounting the mesne profits.(e)

19. Under a covenant for further assurance a purchaser may, of course, require the removal of a judgment or other incumbrances.(f)

20. If the time for further assurance be limited, the purchaser must take care to require the act to be done within the time whilst the parties are competent to do it.(g)

21. A covenant to do all reasonable acts means such acts as the law requires; and if it be an unnecessary act which is called for, it is not a reasonable act, or one which would be required by law.(h)

(y) *Gibson v. Goldsmid*, 5 De G., M. & G. 757, 1 Jur. N. S. 1. see 3 & 4 Will. 4, c. 74, s. 55 to 69; *sup.* ch. 12, s. 4.

(z) *Wade v. Paget*, 1 Bro. C. C. 363.

(d) *Johnson v. Nott*, 1 Ver. 271.

(a) *Napper v. Ld. Allington*, 1 Eq. Ca. Ab. 166, pl. 4.

(e) *Zouch v. Swaine*, 1 Ver. 320.

(b) *Fain v. Ayers*, 2 Sim. & Stu. 533; *sup.*; *Hallett v. Middleton*, 1 Rus. 243; and *sup.*

(f) *Per Heath J.*, 5 Taunt. 427; *Stock v. Aylward*, 8 Ir. Ch. Rep. 429.

(g) *Nash v. Ashton*, Skin. 42.

(c) *Pye v. Daubuz*, 3 Bro. C. C. 595;

(h) *Per Wood B.*, in *Warn v. Bickford*, 9 Price, 43.

22. It was ruled by Holt C. J.,⁽ⁱ⁾ that if A. covenant with B. to make further assurance to B., at the cost of B., A. ought to give notice to B. what sort of assurance he will give, and then B. ought to tender the costs, and then A. ought to make the assurance; but according to the common covenant for further assurance, the sort of assurance is to be pointed out by the purchaser, so that he would have to tender the costs at the time he required the assurance.

* 23. If the covenant be to make such further assurance as the purchaser's counsel shall advise, the purchaser himself cannot devise the assurance,^(k) but this technicality is obviated by the usual form, which requires such further assurances to be executed as the purchaser, his heirs or assigns, or his or their counsel shall advise, or devise and require, which means what it expresses, that either the party *or* the counsel may devise the assurance. And the seller should be permitted to read the assurance, and to go to his own counsel to consider it, and to have convenient time after the assurance shown to him to perfect it.^(l) (1) In the or-

(i) *Heron v. Treyne*, 2 Ld. Ray. 750; (k) *Bennet's case*, Cro. Eliz. 9; *Baker v. Bulstrode*, 2 Lev. 95; 1 Mod. 104.

(l) *Bennet's case*, *ubi sup.*

(1) But in *Manser's case*, according to Coke's report, 2 Rep. 3 a, it was laid down, that where a man is literate, he is bound by law to deliver it presently upon request, and hath not time to consult upon it with counsel learned in the law; but the case turned upon the pleading and upon the distinction taken where, as in that case, the act was to be performed by a stranger and not by the covenantor: *Moo.* 182, pl. 326; and indeed in *Leonard's report* it is stated, that the obligation was to execute the assurance on the 1st of January, and the deed was not tendered till before sun-setting on the 31st of December, so that, if not then executed, the obligation would have been avoided, and it is there said, that the opinion of the justices was that the obligation was forfeited, for when he knew the last instant of time, he ought to have had his counsel then ready with him; 4 Lev. 61. But although this point was mooted (see *Moo.* 183), it does not appear to have arisen in the case: see the pleadings in *Coke*. The case which was mainly relied upon in *Manser's case* was decided *before Bennet's case*, which latter seems to give the true rule, and the former case can hardly be said to raise the point, because the obligor refused to execute the deed, and did not simply require time to consult his counsel: And the tender itself was traversed; and it was upon a motion in arrest of judgment that it was said, the obligor required time to place the deed before his counsel to be advised upon it; *sed hoc non allocatur* Dyer says, for the covenant was peremptory, viz., to be performed presently at his peril: *Wotton v. Cooke*, Dy. 337 b, pl. 39; *Fitzhugh v. Dennington*, 2 Ld. Ray. 1096.

dinary course of business, the draft of the intended assurance is sent to the seller for his perusal, and to enable him to take counsel's advice upon it; and the courts would, no doubt, upon a review of the authorities, feel themselves at liberty to adopt a reasonable rule on this subject.

24. A mere agreement to convey an estate as a third person should advise, of course would not justify the requisition that, beyond the conveyance, the seller should enter into a bond for quiet enjoyment against all persons,^(m) or indeed any bond at all.

25. But this was carried further, and it was held that an agreement by a seller to convey the estate by such reasonable assurance as by the purchaser should be advised and required, did not authorize the purchaser to require a conveyance with common covenants against incumbrances by the seller, and for further assurance, because the agreement was not to make the assurance with reasonable covenants.⁽ⁿ⁾

26. And it is still clear that there must not be *any* warranty in * such a deed, and indeed no warranty is now ever contained in a common conveyance. But in *Lassels v. Catterton*,^(o) where under a common covenant for further assurance, a conveyance was tendered with the usual covenants, Mr. Justice Twisden said, that he knew it had been held that, if a man be bound to make any such reasonable assurance as counsel should advise, usual covenants may be put in, for the covenant shall be so understood.

27. Where the agreement is to convey an estate upon a sale, the purchaser would have a right to a conveyance with usual covenants, although nothing was expressed about covenants in the agreement. But where the conveyance is really a further assurance, the purchaser must be supposed to have already obtained all such covenants for title as he was entitled to, and therefore could not require any new ones from the seller in the further assurance. If a trustee were to convey an outstanding legal estate to the purchaser, in pursuance of the seller's covenant for further assurance, he not having before entered into any

^(m) *Staynrod v. Locock*, Cro. Jac. 115.

⁽ⁿ⁾ *Coles v. Kinder*, Cro. Jac. 571.
^(o) 1 Mod. 67.

covenant, would be bound to covenant in the usual way that he had done no act to incumber the estate: and the seller would be compellable to procure a conveyance from him with such a covenant. No real difficulty is likely to arise in practice upon this point.

CHAPTER XVI.

OF SATISFIED TERMS.

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| <ol style="list-style-type: none"> 1. Cesser of terms under 8 & 9 Vict. 2. Nature of attendant term. 4. Union of term and inheritance, a merger. 5. Unless freehold in <i>auter droit</i>. 6. Particularly if union by act in law. 7. Tenant by the curtesy and termor. 8. Executor having a term and buying the fee. 9. Freeholder in his own right and termor in <i>auter droit</i>, no merger.—Freeholder marrying the termor.—Grant by lessee to the wife of lessor. 10. Purchase of freehold by termor in right of his wife. 11. Lessee appoints freeholder executor, no merger. 12. Years may merge in years. — Term saved where termor, releasee, &c., to uses. 13. Resuscitation of term or creation of new one. 14. Law <i>v.</i> Urlwin. | <ol style="list-style-type: none"> 15. Observations thereon. 16. Provisoos for cesser. 17. Presumption of surrender. 18. 8 & 9 Vict. c. 112, directing terms to cease. 20. } Protection afforded by term. — Not 24. } against crown debt. 21. Unless term not assigned for crown debtor. * 22. Against dower. — But term must have been assigned. 25. <i>Freer v. Hesse</i>. 26. Term in gross attends by implication if it would merge by union. 27. Although there is an intervening term to which purchaser is entitled. — And a nominal reversion is left outstanding, but no charge. 28. Implication may be rebutted. 29. The new statute. |
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1. THIS was one of the most important chapters in the original work on Vendors and Purchasers, but it is now comparatively of little importance in consequence of the act to which we have already referred, *(a)* which creates an absolute cesser of every term which, on the 31st December, 1845, by express declaration or by construction of law, was attendant on the inheritance. But as the protection of every such term where attendant by express declaration is preserved, it will still, in such cases, be necessary to revert to the old law. Every term becoming satisfied *after* that day, and which, by express declaration or by construction of law, becomes attendant upon the inheritance, at once ceases, *(b)* so that it is still necessary to know when a satisfied term attends by construction of law; and, in many cases, the question will still arise whether a term has ceased by force of a

(a) 8 & 9 Vict. c. 112, s. 1.

(b) S. 2.

proviso for cesser in the instrument creating it, or, if not, whether a surrender of it can be presumed; and of course the law as to the merger of terms in the freehold remains unaltered.(1)

2. I. Of the nature of an attendant term we need now only observe that, whether attendant by express declaration or by implication, it was governed by the same rules as the inheritance itself was subject to. Therefore, it would not have been forfeited by the felony of the owner of the inheritance; (c) but if the inheritance had escheated, the term would have gone with it.(d) So where a devisor intended the inheritance to pass, but by reason of the informality of the will, it descended to the heir, the term would not have gone to the devisee, but followed the inheritance in its devolution on the heir.(e) The same principle was followed as regarded an attendant term being assets for the payment of debts, but the distinctions * on this head were swept away before the statute creating a cesser of the term, by the 3 & 4 Will. 4, c. 104, which made all freehold, customary-hold, and copyhold estates assets to be administered in equity for the payment of even simple contract debts. But creditors by specialty, in which the heirs are bound, are to be paid in full before the creditors by simple contract or by specialty in which the heirs are not bound are to be paid any part of their demands; (f) which provision makes an equity of redemption of a mortgage in fee legal assets.(g)

3. II. As to the merger, cesser by proviso, or presumption of the surrender of a term :

(c) *Atty. Gen. v. Sands*, 3 Ch. R. 19; *Atk.* 71; *Nourse v. Yaworth*, *Finch*, *Hard.* 488. 155, was before the statute of frauds;

(d) *Thrupton v. Atty. Gen.* 1 Ver. 340, *Bret v. Sawbridge*, 3 Bro. P. C. 141, 357; *Ld. Downe v. Morris*, 3 Hare, 394. *Tom.*; *Fearne Ex. Dev.* by *Pow.* 145, n. As to felony, &c. by the trustee, see 4 & 5 (a); *App. Purch.* No. 17.

Will. 4, c. 23. (f) *Price v. Price*, 15 Sim. 484; see

(e) *Tiffin v. Tiffin*, 2 Ch. C. p. 49, 55; *Dunne v. Doran*, 13 Ir. Eq. R. 545.

2 Free. 66; *Whitchurch v. Whitchurch*, (g) *Foster v. Handley*, 1 Sim. N. S. *Gilb. E. R.* 168; *Villiers v. Villiers*, 2 200.

(1) In *Trollope v. Routledge*, 1 De G. & Sm. 662, a married woman, legal tenant in tail, subject to a term to secure a jointure, was held to have an equitable estate during the term, which entitled her to a settlement on a bill filed by her. This, I apprehend, is altogether a new view of the rights of such a person, and it seems difficult to support the decision.

4. Where a term of years and the inheritance meet in one person in the same right, the term is extinct.^(g¹)

5. So a man cannot, Sir Edward Coke says, have a term for years in his own right, and a freehold in *auter droit*, to consist together; (*h*) and he illustrates this rule by stating, that where a man, lessee for years, takes a feme lessor to wife, the term is extinct. But this position appears to be contradicted by the case of *Lichden v. Winsmore*,⁽ⁱ⁾ in which it was held, that if there be lessee for years, reversion for life to A., a married woman, and the lessee grant his estate to the husband, and then the wife dies, the term is not extinct, because the husband has the estates in several rights, for the freehold was in the wife and the husband was merely seised in her right; or, to speak more correctly, the freehold was in the husband and wife, although in her right.^(k)

6. And it is clear that, if in a case like this, the coalition be not occasioned by the act of the termor, the term will not merge. Thus the descent of the fee upon the wife of a termor for years after the intermarriage will not drown the term, because the estates do not coalesce by the act of the termor for years,^(l) and the term he holds in his own right, and the freehold in right of his wife. But Coke's doctrine was not overruled without opposition. In a recent case,^(m) where the wife of a lessee for years had the reversion in fee devised to her, it was held that the term did not merge by the acquisition; the reversion was not acquired by the act of the party himself in the sense in which that term is used in the cases.

(g¹) [4 Kent (11th ed.), 99 *et seq.*; Roberts v. Jackson, 1 Wend. 478; 1 Cruise Dig. by Mr. Greenleaf, vol. 1, tit. 8, ch. 2, §26; 3 *Ib.* vol. 6, tit. 39, where the whole subject of merger is fully treated. So where the legal estate and the equitable interest in the same lands become vested in the same person, the equitable estate becomes merged and lost in the legal, and the whole fee simple estate follows the legal title. *Hopkinson v. Dumas*, 42 N. H. 296; *Goodright v. Wells*, Doug. 747; *Wade v. Paget*, 1 Bro. C. C. 364; *Selby v. Alston*, 3 Ves. 339; *Nicholson v. Halsey*, 1 John. Ch. 417; *Gardner v. Astor*,

3 John. Ch. 53; *Creagh v. Blood*, 3 J. & L. 133; *Healey v. Alston*, 25 Miss. 190; *Brown v. Boutee*, 10 Sm. & M. 268.]

(h) 1 Inst. 338 *b*; 9 East, 372.

(i) 2 Rol. R. 472; 1 Ro. Ab. 934, pl. 10; Ben. 141; *Thorn v. Newman*, 3 Swan. 603; *Jones v. Davies*, 5 H. & N. 766, *aff'd* Ex. Ch. 7 H. & N. 507.

(k) *Polyblank v. Hawkins*, Doug. 329.

(l) *Ly. Platt v. Sleep*, Cro. Jac. 275; 1 Buls. 118; *Jenk. 2d Cent. pl. 38*; *Doe v. Pett*, 11 Ad. & El. 842.

(m) *Jones v. Davies*, 5 H. & N. 766, 7 H. & N. 507.

7. Where, however, a husband, termor for years, seised of the freehold in right of his wife, has issue by the wife, so that he is * entitled, in his own right, as tenant by the curtesy, there seems reason to contend that the term will merge.(n) But in the modern case before referred to,(o) it was held that the term would not at all events merge during the wife's lifetime, for the husband was only tenant by the curtesy initiate.

8. A term vested in a person as executor *may* belong to him beneficially; and it therefore seems, that if he purchase the reversion, the term will be extinct; but there is an *obiter dictum* of Holt's in *Cage v. Acton*,(p) where he admitted (as a point perfectly clear) that if a man hath a term as executor, and purchases the reversion, this is no extinguishment. But in Brooke's Abridgment, it is in three several places (q) stated to have been held by the judges Hales and Whorwood, in 4 Edw. 6, that if a man has a lease for years as executor, and afterwards purchases the land in fee, the lease is extinct; and this position is cited and not denied in several cases,(r) and is adopted by Rolle in his Abridgment.(s) So in a case in Leonard,(t) Dyer explicitly laid down the same doctrine; and it has been treated as clear law in two cases, one of which is reported by Hetly,(u) and the other by Freeman.(x) And in one case one of the judges thought, that even the descent of the fee on the executor would merge the term,(y) although Gilbert justly questions this position.(z) The rule, that a purchase of the fee by the executor shall merge the term, appears to be founded in reason as well as upon authority; for, as far as his own interest is concerned, there cannot be any reason why the term should not merge. It is admitted, however, on all hands, that the term shall not be extinct as to creditors, and this I am induced to believe, from Raymond's report of *Cage v. Acton*, is all that Holt meant,(a) although his *dictum* is so generally stated in Comyns's and Salkeld's reports of this case. At any rate, it was an *obiter*

(n) 1 Buls. 118.

(o) *Jones v. Davies*, *ubi sup.*

(p) 1 Salk. 326; Com. 69; Webb v. Russell, 3 T. R. 393.

(q) Bro. Ab. Extinguish. 54; Leases, 63; Surrender, 52.

(r) 3 Leo. 111; 2 Rol. R. 472.

(s) Ro. Ab. 934, pl. 9.

(t) 4 Leo. 37, pl. 102.

(u) Het. 36.

(x) 1 Free. 289, pl. 338.

(y) 3 Leo. 112.

(z) Bac. Ab. Leases (R).

(a) 1 Ld. Ray. 520.

dictum, and cannot affect a doctrine apparently so well established; and it is therefore submitted to the reader, that in a case of this nature the term must merge in the inheritance, except as to creditors.

9. But a man may have a freehold in his own right, and a term in *auter droit*.^(b) Therefore, if a man seised of the freehold intermarry with a woman termor for years, the term is not extinct, but the husband is possessed of the term in right of his wife during the *coverture, because he has not done any act to destroy the term, and it is cast upon him by the act of law.^(c) So if the lessee grant the term to the wife of the lessor, it will not merge.^(d)

10. But if a man possessed of a term in right of his wife purchase the freehold, there seems ground to contend, that the term will merge, inasmuch as the estates coalesce by his own act, and not, as in the case of marriage, by the act of law; and accordingly in one case,^(e) Dyer held the wife's term to be extinct by the husband purchasing the fee; and Manwood C. B. agreed with him; and the same doctrine appears to have been held in a case reported by Moore.^(f) Hobart, however, seems to have been of opinion, that a purchase by the husband of the fee would not extinguish the term,^(g) and in this opinion Holt appears to have coincided.^(h) In the case of *Jones v. Davies*, this point was discussed, and the court manifestly leaned to the opinion that the term would not merge although the second estate be acquired by the act of the husband himself,⁽ⁱ⁾ and this would probably be the determination, although in this case it was not necessary to decide the point. It was also held that, although the husband by the birth of issue was already tenant by the curtesy initiate, yet as the wife was still living the term had not merged.

11. Upon the foregoing principle, if the lessee make the freeholder his executor, the term will not merge.^(k)

(b) 1 Inst. 338 b.

(c) *Bracebridge v. Cook*, Plo. Com. 417; see 4 Leo. 38; Godb. 2; Het. 36; *Jones v. Davies*, 5 H. & N. 766, 7 H. & N. 507.

(d) *Bracebridge v. Cook*, Plow. Com. 417.

(e) Godb. 2; 4 Leo. 38.

(f) Mo. 54, pl. 157.

(g) *Young v. Radford*, Hob. 3.

(h) See 1 Salk. 326.

(i) 5 H. & N. 766, 7 H. & N. 507.

(k) 1 Inst. 338 b; 1 Free. 289; pl. 338; Att. Gen. v. Sands, 3 Ch. R. 19.

12. It was formerly holden, that a term for years could not merge in a term for years; but in *Hughes v. Robotham*,^(l) it was determined, that if there be two termors, he who has the less estate may surrender to the other, and the term will merge in the greater; 2dly, that although the reversion be for a less number of years than the term in possession, yet the term in possession shall drown in that in reversion; but a conveyance to the termor as a releasee to uses would not extinguish the term.^(m) But an assignment by executors of a termor of the term vested in the testator was held not to transfer, so as to merge, another term vested by assignment in one of the executors as a trustee for the testator.⁽ⁿ⁾

13. A deed purporting to be an assignment of an old term may, if that term has by any accident ceased, operate as the creation of a new * one. As in the common case of an assignment of a term in which the freeholder in reversion joins in granting, bargaining, selling, and assigning the term; if the old term has become void, it will be resuscitated, or a new one created from the period referred to, by these words.^(o)

14. In the case of *Law v. Urlwin*,^(p) where an underlessee bequeathed her underlease to her lessor (who held for a longer time) in trust for A., and appointed the lessor her executor; it was held that the underlease had merged, but nevertheless the lessor and executor was bound to allow A., as the *cestui que trust*, to have the beneficial enjoyment without the legal estate, commensurate with the interest under the sublease. The lessor and executor in this case assigned the property to A. for the residue of the term in the sublease, subject to the covenants in the underlease on the part of the lessee, and the lessor and executor covenanted that he had done no act to incumber; it was decided that the instrument was what it professed to be, viz., an assignment, because such was the intention recited, and there

(l) *Hughes v. Robotham*, Cro. Eliz. 302; see Bac. Ab. Leases (S.), s. 2; Stephens v. Brydges, V. C. 1821, MS. accordingly. 3 Keb. 310; *Fountain v. Cook*, 1 Mod. 127; Bac. Ab. Leases (R.); *How v. Stiles*, S. C. 3 Keb. 283, 309; 2 Lev. 126.

(m) 27 Hen. 8, c. 10, s. 3; *Chesney's case*, Mo. 196, pl. 345; 7 Rep. 19 b, 20 a; *Ferrers v. Fermor*, 2 Rol. R. 245; Cro. Jac. 643; *Terrie's case*, 1 Vent. 280; see

(n) *Rooper v. Harrison*, 2 K. & J. 86.

(o) See *Denn v. Kemeys*, 9 East, 366; *Doe v. Brooks*, 3 Ad. & El. 513.

(p) 16 Sim. 377.

was a covenant by the assignor that he had not incumbered; but it was held to be void as an assignment, because the thing attempted to be assigned was absolutely gone, but still it was considered that A.'s equity to have the beneficial interest during the continuance of the sublease remained. The original lessor (who was the executor of the underlessee) died, and his executors, in order to avoid any question of the legal validity of the last mentioned deed as a resuscitation of the sublease, by a new underlease, demised the property to A., commensurate in point of duration with the term granted by the original sublease. And upon a question between A. and a purchaser from him, it was held that the title was bad, for the lessor's executors had no authority to part with the legal estate in this way, and A.'s equitable title was held to be good, but his legal title to be invalid.

15. Some of these points seem to require further consideration. 1. The effect of the merger, it is conceived, was not simply to render it incumbent on the lessor and executor to allow A. to have the beneficial enjoyment without the legal estate, but as his beneficial interest remained, to have that covered by the legal estate, which had by accident become merged. 2. But if the lessor and executor could have withheld the legal estate, he did not intend to do so, as the assignment from him proved, even if, as it was held, the assignment was void. 3. But it is submitted that although the assignment could not operate as such, yet in favor of the intent it should have been held to operate to resuscitate the sublease; the recital proved the intention to vest the legal sublease in A., although it was founded in * error, and there was nothing remarkable in the covenant that the lessor had done no act to incumber, regard being had to the fact that the sublease subsequently to its creation had become vested in him. 4. As it was admitted that A.'s equitable interest in the sublease remained, how could it be wrong in the executors of the lessor to clothe that equitable interest with the legal estate? And if in any other case the act would have been wrong, how could it be impeached in this, where the executors were simply giving effect to the legal, but, it may be assumed, informal deed which their testator had himself executed? It would be difficult to maintain that a court of equity could have

enforced a reassignment from A. of the legal estate, and if not, the title, as far as we have had occasion to refer to it, was a good one.

16. Where terms for years are raised by settlements, it is usual to introduce a proviso, that they shall cease when the trusts are at an end. In well drawn deeds, this proviso always expresses three events: 1st, the trusts never arising; 2dly, their becoming unnecessary or incapable of taking effect; or, 3dly, the performance of them. But it frequently happens, in ill-penned instruments, that these events are not accurately expressed, or not all provided for. If a term for years be created for raising a sum of money for the first son of A. who shall attain twenty-one, and it is declared by the deed, that when the trusts are performed, the term shall cease: now if A. should not have a son who attains twenty-one, the trusts would not have arisen, and consequently could not be performed; and it seems that the term will not cease; the event which happened not being provided for in the declaration for cesser of the term; but this is of little importance since the passing of the act to which our attention has already been drawn. The courts will endeavor to effectuate the intention of the parties.(q)

17. The law relating to the presumption of a surrender of a term, whether assigned to attend the inheritance or not, is fully considered in the appendix to the eleventh and some previous editions of this work.(r) That law is still in operation; and the case of *Doe v. Hilder* may be considered as overruled. A jury ought not to be directed to presume, nor would the court itself without a jury presume a surrender of an attendant term, where it has been dealt with in favor of a purchaser for value without notice, although it had been left undisturbed for a considerable period during which settlements of the estate were executed.(s) But this question can now only * arise as to terms within the exception, and it is not likely often to arise even as to these. The reader is therefore referred for the cases to the Appendix already mentioned.

(q) *Hays v. Bailey*, Rolls, 10th Aug. 1813; *Purch.* 774; *Leach v. Leach*, 2 Dru. & War. 568. *Garrad v. Tuck*, 8 C. B. 231; 13 Jur. 871; *Doe v. Langdon*, 12 Q. B. 711; *Hele v. Ld. Bexley*, 17 Beav. 14, 28, 29.

(r) App. *Purch.* No. 26, to which add (s) *Cottrell v. Hughes*, 15 C. B. 532.

18. It remains to refer once more to the statute which will shortly put an end either completely or partially to all satisfied terms of years attendant on the inheritance.(t) By force of it every *satisfied* term which on the 31st December, 1845, either by express declaration or by construction of law, was attendant on the inheritance, absolutely ceased: so has every term which has been *satisfied* since that day, and which either by express declaration or by construction of law, hath since that day become attendant on the inheritance; and so will cease every term which shall hereafter be satisfied, and so become attendant on the inheritance. With this only exception, that every term which was so attendant by *express declaration* on the 31st December, 1845, is to afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim, and demand, as it would have afforded to him had it continued to subsist, but had not been assigned or dealt with after the 31st December, 1845; and shall, for the purpose of such protection, be considered in every court of law and equity to be a subsisting term. Such is the power of an act of parliament, that although such a term has absolutely ceased, yet it is to be deemed for those purposes as a subsisting term. This puts an end to the assignment of satisfied terms as a protection to a purchaser; and there appears to be no foundation for the notion that any such term can now be kept on foot as an attendant term by assignment. Of course a term attendant on the inheritance even by express declaration on the 31st December, 1845, has been held to have ceased on that day; (u) but yet to have continuance, as far as it is required, for the protection of those for whose protection it was assigned, (x) or agreed to be assigned. (y) In the last case on this statute, (z) a settlement was made *subject to a prior term of years for securing portions*, on one for life remainder to his children in fee, and in default to another for life with remainder to her children in fee, and the children of the first tenant for life, who were held to be illegitimate, were defendants in an ejectment brought

(t) 8 & 9 Vict. c. 112, *sup.* ch. 12, s. 6.

(u) Doe v. Price, 16 M. & W. 660; 15 C. B. 550; Doe v. Mouldsdales, 16 M. & W. 689.

(x) Cottrell v. Hughes, 15 C. B. 532; *inf.* Freer v. Hesse; Doe v. Jones.

(y) Shaw v. Johnson, 7 Jur. N. S. 1005; see the dates there; 1 Drew. & Sm. 412; Sugd. Stat. (2d edit.) 282, n.

(z) Plant v. Taylor, 7 H. & N. 211.

by the children of the second tenant for life, and the defendants claimed the protection of the term of years. The portions had been paid off, and the term had been assigned to a trustee to attend the inheritance under the settlement after the settlor's death to which *the first tenant for life was a party; the term was assigned by way of mortgage (of course for the benefit of the tenant for life), and afterwards to attend the inheritance, and the defendants afterwards paid off the mortgage, and obtained an assignment of the term to a trustee for them, and to attend the inheritance. It was decided that the term could not be set up by the defendants, for they had no interest to protect; there were no mesne incumbrances to be protected against, except such as had been created by the dealings with the term by way of mortgage; the mortgage by the tenant for life was invalid beyond his own life, and the assignment of the term for any other purpose than to attend the inheritance was wholly unauthorized. We cannot fail to observe that if any one was entitled to the protection of the term, it was the persons really entitled to the estate under the settlement: the defendants were not purchasers for value without notice, but claimants *under the settlement* in a character which they did not fill.

20. As to the protection afforded by an attendant term, Lord Hardwicke was of opinion that the protection should extend generally to all estates, charges, and incumbrances, created intermediate between the raising of the term and the purchase.^(a) And this doctrine, unqualified as it is, seems correct. For as the term will prevail over a strict title to the inheritance, it will of course be a protection against judgments, mortgages, and all other incumbrances and estates less than a fee; and it may, in like manner, be used as a shield against an act,^(b) or commission^(c) of bankruptcy. But it was decided in *The King v. Smith*,^(d) that a term of years, which had been assigned to a trustee for the crown debtor, would not protect a purchaser against crown debts, although he purchased *bonâ fide* and without notice.

(a) 1 Term R. 768; 15 C. B. 560.

(b) *Collett v. De Gols*, For. 65.

(c) *Hitchcock v. Sedgwick*, 2 Ver. 156; reversed in Dom. Proc.; *post*, c. 24.

(d) Ex. 2d March, 1804, MS. App.

Purch. No. 15; 13 Price, 656; *Rex v.*

Lamb, 13 Price, 649; M'Clel. 402.

21. But where the term has never been assigned to attend for the crown debtor, it will not be affected by the claim of the crown in the hands of a trustee for a *bonâ fide* purchaser. Therefore, where upon a purchase a term of 1,000 years was limited to the seller to secure a portion of the purchase money, and subject to the term, the fee was limited to the purchaser; the mortgage was not paid off by the purchaser, but he sold the property, and the second purchaser paid off the mortgage, and took an assignment of the term to a trustee for himself to attend the inheritance; it was held that the term was not bound by the crown debt of the first purchaser.(e)

22. A purchaser may protect himself against the dower of the vendor's wife, by a term created previously to her right of dower attaching on the estate, although he had notice of the marriage, and of her *title to dower.(f) In cases within the late dower act the dower is wholly in the husband's power.(g) The term, however, must have been actually assigned to a trustee for the purchaser, if it was intended to be used as a bar to the wife's dower; (h) because, by the rules of equity, every term attendant on the inheritance follows it in its various modifications, and in the charges and incumbrances which attach on it, or are created in it.(i)

23. As the act relating to terms of years saves those terms of years which on the 31st December, 1845, were attendant upon the inheritance by express declaration, it is still important to ascertain who will be entitled to the benefit of the statute as from that day. A purchaser can no longer obtain any advantage by his own vigilance. Before the statute a purchaser might have been entitled to the benefit of an outstanding term, although he

(e) *The King v. Smith, ubi sup.*

Ves. 130; *D'Arcy v. Blake*, 2 Sch. & Lef.

(f) *Lady Radnor v. Rotherham*, Pre.

387.

C. 65; 1 Ver. 179, 356; 2 Ch. C. 172; Show. P. C. 69; *Brown v. Gibbs*, Wray v. Williams, *Dudley v. Dudley*, Pre. C. 97, 151, 241; *Banks v. Sutton*, 2 P. Wms. 700; *Hill v. Adams*, or *Swannock v. Lyford*, 2 Atk. 208; *Ambl.* 6; *Butler's n.* (1) Co. Litt. 208 a; *Wynn v. Williams*, 5

(g) *Sup. c.* 12, s. 1.

(h) *Maundrell v. Maundrell*, 7 Ves. 567; 10 Ves. 246, particularly the close of the judgment; *Wilkins v. Lynch*, 1 Hay. Ex. R. 98.

(i) *Charlton v. Low*, 3 P. Wms. 328; *Lady Radnor v. Vendebedy*, Show. P. C. 69.

had neither an assignment of it nor the possession of the deeds relating to it.(j)

24. The true rule was laid down by Lord Talbot, that a term signed in trust to attend the inheritance will in equity follow all the estates created thereout, and all the incumbrances subsisting upon such inheritance, and is so connected with it, that *equity will not suffer it to be severed to the detriment of a bonâ fide purchaser*, who shall have the benefit of all interests which the mortgagor had at the time the mortgage was made, *unless against an intermediate purchaser without notice.*(k)

25. And this rule appears to have been acted upon since the statute in a case (l) between a vendor and a purchaser, where a mortgagee with a power of sale, and without notice of prior judgments, had a satisfied term assigned for him, and to attend, and it was held that the term, although it had ceased to exist by force of the act, would protect a purchaser from him against the judgments, although he had notice of them. This of course was quite right, but on appeal, without disputing this view, the decree was reversed, because it might be difficult for the purchaser to prove that the vendor himself had not notice.(m) The protection in these cases is not claimed by the purchaser as derived from the person from whom he obtains the legal estate, but arises from his personal situation, and attaches originally to himself the moment he * obtains the legal interest in the estate.(n) Therefore a purchaser without notice obtaining a legal estate from a third person may protect himself by it, although that person was a trustee, and had notice of the other claims, but he cannot protect himself where the party was a trustee upon express trusts.(o)

26. In regard to terms attendant by implication, it is a general rule that, whenever a term would merge in the inheritance if united, it shall attend, if in a different person, without an express declaration, by implication of law founded on the statute of frauds : (p) and the custom of London shall not prevail over this

(j) 11 Ves. 270; Wilker v. Bodding-ton, 2 Ver. 599; 1 T. R. 768.

(k) 3 P. Wms. 330; see Shine v. Gough, 1 Bal. & Beat. 436; Blake v. Sir E. Hungerford, Prec. Ch. 158; 1 T. R. 763.

(l) Freer v. Hesse, 17 Jur. 177.

(m) 17 Jur. 703; 4 De G., M. & G. 495; as to notice, see p. 532, 533.

(n) 1 Eden, 530.

(o) Sanders v. Deligne, 2 Fre. 123.

(p) 1 Bro. C. C. 70.

operation of law.(q) Therefore, where a person purchases the inheritance in his own name, and takes an assignment of a term in the name of a trustee;(r) or takes a conveyance of the fee in the name of a trustee, and an assignment of a term in his own name;(s) the term attends the inheritance, unless there be an express declaration to the contrary, whether the term be purchased or obtained before or after the purchase of the fee. And in general there is no difference between an assignment of a term to a trustee, in trust to attend the inheritance, and an assignment to a trustee, in trust for the purchaser, his executors, administrators, and assigns.(t) The same rule prevails where a man possessed of a term for years contracts for the inheritance.(u)

27. And where, by reason of an intermediate term outstanding, a term cannot merge, although vested in the purchaser together with the fee, yet if the purchaser be entitled to such outstanding term, even the term vested in the purchaser, and which cannot merge, shall attend the inheritance, without any express declaration for that purpose.(x) And even if the purchaser cannot obtain an assignment of the whole term, yet, if a nominal reversion only, as a reversion of a few days, be left outstanding, so much of the term as is assigned to a trustee for the purchaser will be deemed attendant on the inheritance, without any express declaration for that purpose. But where the term is subject to rents or charges in favor of other persons, whereby the purchaser has not *substantially* the whole *beneficial* interest in the estate, there an express declaration is necessary to make the term attendant.(y)

* 28. This implication, like all implications of law, or equita-

(q) *Green v. Lambert*, 1 Ver. 2; *Dowse v. Derivall*, *Ib.* 104; 2 Ver. 57; Reg. lib. A. 1683, fol. 283; *Rich v. Rich*, 2 Ch. C. 160.

(r) *Tiffin v. Tiffin*, 1 Ver. 1; 2 Ch. C. 49, 55; *Whitchurch v. Whitchurch*, 2 P. Wms. 236; 9 Mod. 124; *Gilb. E. R.* 168; *Goodright v. Sales*, 2 Wils. 829.

(s) *North v. Langton*, 2 Ch. C. 156; *Dowse v. Derivall*, 1 Ver. 104; *Att. Gen. v. Sands*, 3 Ch. R. 19.

(t) *Best v. Stamford*, Pre. C. 252; *Tif-*

fin v. Tiffin, 1 Ver. 1; *Holt v. Holt*, 1 P. Wms. 374; *Pitt v. Cholmondley*, Ch. 9 Nov. 1751, MS.

(u) *Capel v. Girdler*, Rolls, 16 March, 1804, MS., 9 Ves. 509; *Cooke v. Cooke*, 2 Atk. 67; *sup.* ch. 5.

(x) *Whitchurch v. Whitchurch*, 2 P. Wms. 236; 9 Mod. 124; *Gilb. E. R.* 168; see 1 Bro. C. C. 170.

(y) *Scott v. Fenhoulet*, 1 Bro. C. C. 69; *Scott v. Knox*, 4 Ir. Eq. R. 397; see *Gunter v. Gunter*, 23 Beav. 571.

ble presumptions, may be rebutted by even a parol declaration of the person in whose favor the implication or presumption is made.

29. Questions of some nicety may arise upon terms attendant on the inheritance by construction of law with reference to the act. It should be borne in mind that it only applies to *satisfied* attendant terms, but it expressly extends to all freehold tenements and hereditaments, whether corporeal or incorporeal, and to all such customary land as will pass by deed, or deed and admittance, and not by surrender.(z) A satisfied mortgage term, not attendant by express declaration, but which under the old law would have attended the inheritance by implication, has been held not to have ceased, but to remain as a term in gross for the benefit of a purchaser who paid off the mortgage money secured by the term at a time when he believed he was owner of the fee, and in trust for whom the term had been assigned, but not to attend the inheritance, and the term was permitted to be used in ejectment for the benefit of the purchaser, against a claimant of the fee under a title subsequent to the term, but prior to the purchaser's title to the fee.(a)

(z) S. 3; *supra*.

774; Sugd. Stat. 290, where this case is

(a) *Doe v. Jones*, 13 Jur. 824; 13 Q. B. explained.

CHAPTER XVII.

OF INTEREST, DETERIORATION, AND COSTS.

SECTION I.

OF INTEREST, AND DETERIORATION.

I. Of Interest.

1. Purchaser to take profits and pay interest from time fixed for completion. — So of a reversion.
2. Even if money lie dead if purchaser in default.
3. *Contra* if seller cause delay.
4. Possession gives right to interest.
5. Where a receiver is appointed.
6. Rule not universal.
8. Possession taken and abandoned.
9. Objection to title. — Agreement to pay interest on possession rescinded if long delay. — Acquiescence in delay.
10. Interest excluded by agreement to repay costs and charges.
11. Interest on timber money.
12. Rents and interest on sale of estate in possession by the court.
13. Same on sale of reversion.
14. *Trefusis v. Lord Clinton*.
15. Delay where there is a peppercorn rent.
- * 16. Delay where a lease is sold.
17. Annuity sold by the court.
18. Annuity sold by private contract.
19. Written agreement to pay interest.
20. Rests.
21. Lessee under option, buying fee, interest in lieu of rent.
22. Seller answerable for rent not received from wilful default.
23. Where interest on rents.
24. Delay in vendor: if interest exceed rents no interest: seller takes rents.
24. Effect of stipulation to pay interest during delay. — *Jones v. Mudd*. — *Portman v. Mill*.
26. *Esdaille v. Stephenson*. — *Monk v. Huskisson*: unforeseen or unavoidable obstacles.
27. *Birch v. Podmore*: unavoidable obstacle. — *De Visme v. De Visme*.
28. *Widdall v. Nixon*.
29. Result: culpable delay of seller.
30. Present state of law.
32. *Oxenden v. Lord Exmouth*: any cause: wilful default.
33. Public-house with good-will, stock, &c.
34. Purchaser not to pay interest on deposit.
35. Nor the seller if contract proceed.
36. Interest on money left with purchaser to pay incumbrances.
37. Interest at law.
38. Not against auctioneer.
39. Statute of limitations.
41. Vendor to pay interest on money lying ready if no title.
42. 3 & 4 Will. 4, c. 42, s. 28.
43. Interest on opening biddings.
44. Unless unnecessary examination of title affects right to interest.
45. Investment, at whose risk.
46. Return of deposit and interest, where seller's bill dismissed.
47. Injunction: no interest on instalments of interest.
48. Effect of court's suspending payment of interest.
50. Reversal in D. P.: instalments of interest not due.
51. Reversal: retransfer of stock and dividends, or price without interest.
52. Reversal: repayment of costs without interest.

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| <p>53. Interest and rent where sale to trustee set aside.</p> <p>54. Not interest on rents, where.</p> <p>55. Occupation rent with rests.</p> <p>56. Usury: purchase, not loan.</p> <p>57. Five per cent. at law, four per cent. in equity.</p> <p>61. Agreement to pay five per cent. revived.</p> <p style="text-align: center;"><i>II. Of Deterioration.</i></p> <p>62. Delay in seller: compensation for deterioration.</p> <p>63. Not after possession by purchaser.</p> | <p>64. Interest on amount.</p> <p>65. Securing crops, &c., during dispute.</p> <p>66. Felling ornamental timber.</p> <p>67. Or coppice wood.</p> <p>68. Wind-falls.</p> <p>69. Failure of tenants.</p> <p>70. Seller cannot claim for improvements after contract.</p> <p>71. Loss from agreement by purchaser with tenant.</p> <p>72. Mistake in interest: receipt in conveyance.</p> |
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I. Of Interest.

1. EQUITY considers that which is agreed to be done, as actually performed; (*a*¹) and a purchaser is therefore entitled to the profits of the estate from the time fixed upon for completing the contract, whether he does or does not take possession of the estate; (*a*) and as, from that time, the money belongs to the vendor, the purchaser will be compelled to pay interest for it, if it be not paid at the day. (*b*) The court would be slow to execute

(*a*¹) [*Ante*, 175, note; *Kidd v. Dennison*, 6 Barb. 9.]

(*a*) 6 Ves. 143, 352; *Ld. Hardwicke v. Ld. Sandys*, 12 M. & W. 761, at law; observe the dates.

(*b*) *Sir J. Lowther v. Ly. Andover*, 1 Bro. C. C. 396; 6 Ves. 352; *Monro v. Taylor*, 8 Hare, 70; 3 Mac. & G. 713; *Grove v. Bastard*, 1 De G., M. & G. 69. [See *Parke v. Leewright*, 20 Missou. 85; *Cleveland v. Burrell*, 25 Barb. 532; *Baxter v. Brand*, 6 Dana, 298; *Dias v. Glover*, 1 Hoff. Ch. 72; *M'Kay v. Melvin*, 1 Ired. Eq. 73; *Hundley v. Lyons*, 5 Munf. 342; *Mayo v. Purcell*, 3 Munf. 243; *Thomas v. Davenport*, 1 Wash. 127; *Fashott v. Reed*, 10 Serg. & R. 266; *De Visme v. De Visme*, 1 Mac. & G. 336, n. (2), 346, n. (1). Where the vendee in a contract for the purchase and sale of real estate takes possession of the property as owner, without having paid the purchase money, he is bound to pay interest. *Stevenson v. Maxwell*, 2 Comst. 408; *Rutledge v. Smith*, 1 McCord, 399; *Ramsay v. Brailsford*, 2 Desaus. 592; *Boyle v. Rowand*, 3 Desaus.

555; *Hood v. Huff*, 2 Const. Rep. 163; *Breckenridge v. Hoke*, 4 Bibb, 273; *Kester v. Rochel*, 2 Watts & S. 365. The interest on money begins when the money is due; the right to rents and profits, when the purchaser is entitled to possession. *Baxter v. Brand*, 6 Dana, 298. But it was said in *Buchanan v. Lorman*, 3 Gill, 82, by *Archer C. J.*, that, although the general rule might be, that when the purchaser is let into possession and the perception of the rents and profits, he ought to pay interest on the purchase money; yet, as there is generally a great disproportion between the rents and profits and the interest of the purchase money, there would be no propriety in applying the rule to a case where the sale was rescinded. See *Brockenbrough v. Blythe*, 3 Leigh, 647, 648; *Williams v. Rogers*, 2 Dana, 375. So where the purchaser, immediately on finding that there is a difficulty about the title, offers to rescind the contract, to redeliver the possession, and receive back the money advanced, and this is refused by the vendor. *Colcock J. in Rutledge v.*

an agreement which gave to the * purchaser, however long the delay, and to whatever cause attributable, the rents, without any liability to pay interest. If a speedy completion was contemplated in such a case, and an unavoidable long delay occurred, the stipulation might not be held to apply in the altered circumstances.(c) The same rule applies to a sale of a reversion — interest must be paid from the time fixed upon for payment of the purchase money, because the wearing of the lives is equivalent to taking the profits.(d)

2. If the delay in completing the contract be attributable to the purchaser, he will be obliged to pay interest on the purchase money from the time the contract ought to have been carried into effect, although the purchase money has been lying ready and without interest being made of it.(e)

3. But if the delay be occasioned by the default of the vendor, and the purchase money has lain dead, the purchaser will not be obliged to pay interest.(f) The purchaser must, however, in general, give notice to the vendor that the money is lying dead ; (g) for otherwise there is no equality : the one knows the estate is producing interest, the other does not know that the money does not produce interest.(h) A doubt was thrown upon the rule by Lord Cottenham, in *De Visme v. De Visme* ; but in a later case, *V. C. Knight Bruce* acted upon the rule as well

Smith, 1 McCord Ch. 403. If the vendor refuse to accept the purchase money when tendered by the purchaser, interest on it will not be allowed ; *January v. Martin*, 1 Bibb, 586 ; *Hart v. Brand*, 1 A. K. Marsh. 161 ; *Davis v. Parker*, 14 Allen, 104 ; unless he can show that the purchaser has made use of the money, or gained some advantage from it. *Davis v. Parker*, 14 Allen, 104.]

(c) *Birch v. Joy*, 3 H. L. Cas. 565.

(d) *Davy v. Barber*, 2 Atk. 490 ; *Owen v. Davies*, 1 Ves. 82 ; 3 Atk. 637 ; *Bailey v. Collett*, 18 Beav. 179 ; *post*, as to the sale of a reversion before a master.

(e) *Calcraft v. Roebuck*, 1 Ves. jr. 221 ; *Enraght v. Fitzgerald*, 2 Ir. E. R. 87, *et qu.*

(f) *Howland v. Norris*, 1 Cox, 59. [See

Kester v. Rockel, 2 Watts & S. 365 ; *January v. Martin*, 1 Bibb, 586 ; *Hunt v. Brand*, 1 A. K. Marsh. 161. So where the delay is caused by the vendor's death. *M'Kay v. Melvin*, 1 Ired. 73.]

(g) *Calcraft v. Roebuck*, *ubi sup.* ; *Roberts v. Massey*, 13 Ves. 561 ; *M'Cann v. Forbes*, 1 Hog. 13 ; *Regent's Canal Co. v. Ware*, 23 Beav. 575 ; see *Vickers v. Hand*, 26 Beav. 630. [See *De Visme v. De Visme*, 1 Mac. & G. 353, n. (1), and cases cited ; *Selden v. James*, 6 Rand. 465 ; *M'Kinnon v. Sterrett*, 6 Watts, 162 ; *Hunter v. Bales*, 24 Ind. 299 ; *Nantz v. Loben*, 1 Duvall (Ky.), 304 ; *Brockenbrough v. Blythe*, 3 Leigh, 619 ; *Stephenson v. Maxwell*, 2 Sandf. Ch. 273.]

(h) *Powell v. Martyr*, 8 Ves. 146 ; *Comer v. Walkley*, *post*.

settled.⁽ⁱ⁾ But even if a purchaser gave such notice, yet if the money was not actually and *bonâ fide* appropriated for the purchase, or the purchaser derived the least advantage from it, or in any manner made use of it, the court would compel him to pay interest.^(i¹) A singular order was made in *Winter v. Blades* ^(k) in regard to the purchaser's balance at his banker's; but it seems difficult to support the order. If the purchaser has not at all times the full sum *appropriated* to the purchase, the seller can hardly be called upon to enter into an inquiry of the average amount of his balances before and after the purchase.

4. If no time be limited for performance of the agreement, and the purchaser be let into possession of the estate, he must pay interest on the purchase money from that time.^(l) And where a mortgagee whose mortgage carried five per cent. bought part of the estate in mortgage with other portions not included in it at a price exceeding the mortgage money, which, during any delay, was to pay four per * cent., and the mortgagee took possession without prejudice to questions about the title, and retained it for ten years, and neither party had claimed interest, it was held that a case of set-off must be presumed; so that, in effect, the mortgage money was considered as paid off when the purchaser, the mortgagee, took possession, from which time he had to pay four per cent. on the balance of his purchase money.^(m)

5. And where a purchaser was let into possession, and, new incumbrances appearing, filed a bill, and in the progress of the suit a receiver was appointed, with whose salary the seller was charged, yet the court charged the purchaser with interest, allowing him the rents just the same as before the appointment of the receiver, when he was himself in possession.⁽ⁿ⁾ And even a railway company, after acting under the land clauses consolidation act, may, by abandoning the course pointed out by the act, and taking possession, render themselves liable to interest.^(o)

(i) *Dyson v. Hornby*, 4 De G. & Sm. 481.

(m) *Wallis v. Bastard*, 2 Eq. R. 508; 4 De G., M. & G. 251.

(i¹) [See *Davis v. Parker*, 14 Allen, 104; *Nantz v. Loben*, 1 Duvall (Ky.), 304.]

(n) *Smith v. Dolman*, 6 Bro. P. C. by T. 291.

(k) 2 Sim. & Stu. 393.

(o) *Blount v. G. S. & W. Ry. Co.* 2 Ir.

(l) *Ex parte Manning*, 2 P. Wms. 410; [Hundley v. Lyons, 5 Munf. 342.]

Ch. R. 40.

6. It cannot, however, be laid down as a general rule, that a purchaser of estates under a private agreement shall, from the time of taking possession, pay interest.^(o¹) At any rate, although the conveyance be executed, yet he shall not pay interest but from the time of taking possession, if prevented from so doing by the vendor.^(p) But it must be a strong case, and clearly made out, in which he shall not pay interest where he has received the rents and profits.^(q)

7. Where part of a farm had been allotted in lieu of tithes to an impropiator, who agreed to sell it to the owners of the farm for a price to be paid at a short day, on a good title being made and executed, and the possession remained in the purchaser undisturbed, who paid no tithes, but for want of an award twenty-seven years elapsed before a good title could be made, the purchaser was ordered to pay interest at four per cent. from the day fixed for completing the contract.^(r) The act of taking possession is an implied agreement to pay interest; for so absurd an agreement as that the purchaser was to receive the rents to which he had no legal title, and the vendor was not to have interest, as he had no legal title to the money, could never be implied.^(s)

* 8. And where a purchaser took possession under the contract,^(t) and upon the master's report of a fact which he considered fatal to the title, returned the possession, and the court ultimately held that he was bound to complete his purchase, Lord

(o¹) [In cases of vacant city lots, wild land, or other unproductive real estate, it has been held that a contract to pay interest will not be implied where the vendee is prevented from obtaining his title by the fault or negligence of the vendor, although the vendee has been in possession. See *Stevenson v. Maxwell*, 2 Sandf. Ch. 273, 278.]

(p) *Blount v. Blount*, 3 Atk. 636.

(q) 8 Ves. 148, 149; *Comer v. Walker* (1), Reg. lib. A, 1784, fol. 625; *Smith v.*

Skelton, Reg. lib. B, 1799, fol. 807. [See per Colcock J. in *Rutledge v. Smith*, 1 McCord Ch. 403, 404; *Selden v. James*, 6 Rand. 465; *Brockenbrough v. Blythe*, 3 Leigh, 619; *Oliver v. Hallam*, 1 Grattan, 298; *Boyce v. Britchett*, 6 Dana, 231; *Cullum v. Bank*, 4 Ala. 22.]

(r) Att. Gen. v. Christ Church, 13 Sim. 214; [*Oliver v. Hallam*, 1 Grattan, 298.]

(s) *Fludyer v. Cocker*, 12 Ves. 25.

(t) 2 Swan. 226.

(1) The purchaser had been in possession twenty-two years without a conveyance, and the purchase money not paid. The delay was not his, and he said his money was always ready. Lord Thurlow compelled him to pay four per cent. from the time he entered into possession.

Eldon observed, that if the purchaser ultimately obtained possession, he must be considered by relation as in possession, under that title, from the time at which he took possession, and from that time must receive the rents, and account for interest on the purchase money. But it is for those who sell, undertaking that the purchaser may have possession at a particular day, to show that they were in a condition then to give possession.' In that case he must pay interest from the time at which he took possession, and even for the time during which he vacated the possession.(u)

9. Whilst a material objection to the title remains to be cleared up, a purchaser is, of course, justified in declining to take possession, and the court will not compel him to pay interest.(x) If it be agreed that the purchaser shall take possession of the estate, and pay interest on the purchase money from that time, and it afterwards appear that a long time must elapse before a title can be made, the purchaser will be entitled to rescind the agreement. But if the purchaser acquiesce in the delay until the contract is nearly carried into execution, he cannot then appropriate the purchase money, and by giving notice of that circumstance to the vendor discharge himself from the payment of interest;(y)

(u) *Binks v. Lord Rokeby*, 2 Swan. 222. [See *Baxter v. Brand*, 6 Dana, 298.]

(x) *Forteblow v. Shirley*, 2 Swan. 223; *Carrodus v. Sharp*, 20 Beav. 56; [*Stevenson v. Maxwell*, 2 Sandf. Ch. 273. Where payment is to be made on the conveyance of land at a stipulated period, and the land is not conveyed at that time, the purchaser is not in default if he omits to

pay the price, and interest is not recoverable until after he is put in default by the tender of a deed. And the rule is the same, although the purchaser has taken possession, where the land is vacant and unproductive. So held in *Stevenson v. Maxwell*, 2 Sandf. Ch. 273.]

(y) *Dickenson v. Heron*, Rolls, 16th March 1804, MS. (1); *Fludyer v. Cocker*, *sup.*

(1) In *Dickenson v. Heron*, after the execution of a contract for purchase of an estate, it appeared that an act of parliament was necessary to perfect the title, and that some time must elapse before a title could be made; and it was agreed that the purchaser should take possession of the estate, and pay interest on the purchase money. Great delays having arisen, and the purchaser thinking exchequer bills, in which the purchase money was invested, not safe, he sold them, and gave notice to the vendor that the money was lying ready, and without interest being made of it. After the purchase was completed, and the money paid, the vendor filed a bill, asserting his right to interest until the execution of the conveyance. Sir Wm. Grant said: "An agreement of this nature is totally independent of the interest made by the money. When a purchaser is let into possession, the vendor need not mind what is done with the purchase money, because the purchaser agrees to pay interest for the money. And

nor can he claim any compensation * from the seller when he appropriates the purchase money in consequence of the seller's neglect to deliver the abstract, although, according to the contract, he was not liable to pay interest until a good title was shown.(z)

10. If parties stipulate that in case a title cannot be made, all costs and charges incurred by the purchaser in investigating the title shall be paid to him, that express stipulation, it seems, will preclude him from recovering interest on account of his purchase money lying dead. This was so decided in the case of an agreement for a mortgage.(a)

11. In the case of timber on an estate to be taken at a valuation, interest on the purchase money will only commence from the valuation, although the interest on the purchase money for the estate itself may be carried a great way back, because surveyors always value timber according to its present state; and the augmented value of the timber by growth, is an equivalent

(z) *De Visme v. De Visme*, 1 Mac. & G. 336. (a) *Sweetland v. Smith*, 1 Cro. & Mee. 585.

such an agreement can only be affected by great delay, because the purchaser is not to be kept forever bound by a disadvantageous bargain; for the interest might be better than the rents; in which case, if the purchaser was to be bound notwithstanding an unreasonable delay, the vendor would not mind how long he delayed making a title. If the objection had been taken at a different time, it would have been better. He should have made the objection when he knew that an act of parliament was necessary, as he was not before in possession of that fact. But he waived this delay, and he consents to continue to pay interest, and writes a letter which clearly implies that; or he might have waived the agreement. Afterwards he thinks he is entitled to say that he will not pay interest. The ground was totally distinct. He had laid out his money in exchequer bills, and then, upon a supposition that they were not safe, he sold out, and then gave notice that he would not pay interest. He ought certainly to have given notice before he sold out, and to have given the vendor his option, whether he would choose them to remain at his risk, or would waive his interest. This ground was, however, nothing to the vendor, as he had nothing to do with the interest. The only ground upon which he could have waived the agreement, was the delay in the first instance. The defendant mistook his case; he might have come at an earlier period, and insisted not to pay interest; for a court would not have held him to an indefinite period. Besides, the notice was not given until a long delay could not take place." And the master of the rolls decreed the purchaser to pay interest, but, as he bound himself by his long acquiescence, he would not give costs, and interest was only given up to the time the conveyance was delivered to the vendor's attorney for execution, although it was not executed until three months afterwards.

for the interest from the time of the contract to the making of the valuation. *(b)*

12. Upon the sale of an estate in possession, under the order of a court of equity, the rule is, that the purchaser is entitled to the possession or rents from the quarter-day preceding his purchase, paying his money before the following one; *(c)* but he will not be allowed to deduct property tax. *(d)*

13. Where a reversion is sold under the order of a court of equity, interest must be paid by the purchaser from the time of confirming the report absolute, and he will be entitled to the benefit of the wearing or dropping of the lives in the interval; *(e)* (1) and upon a *private contract, interest would run, as we have seen, from the time of the contract. *(f)*

14. A purchaser under a decree of a reversion expectant on a life interest, was ordered to pay interest on his purchase money *from the time of his purchase*, *(g)* but this was not supported by the previous practice of the court.

15. It was laid down in the House of Lords, that if a term is sold with a nominal rent, and years run out, while one of the parties has refused to perform the contract, and the court in the end enforce the contract, the decree should be to perform the contract, as it ought to have been performed years before. *(h)*

16. Where a common leasehold estate is sold, and possession is not delivered to the purchaser, if any delay occurs the vendor must pay a rent in respect of his occupation of the estate; and the purchaser must pay interest on the purchase money during the delay; *(i)* and where an occupation rent is charged against a vendor in possession, the order will not direct an allowance

(b) Waldron v. Forester, Ex. June 30, 1807, MS. *inf.* 589; 2 Yo. & Col. 510, 511; 3 Yo. & Col. 505; Sugd. H. of L. 666; Wallis v. Sarel,

(c) Sup. p. 104; Mackrell v. Hunt, 2 Mad. 34, n. 5 De G. & Sm. 429.

(d) Holroyd v. Wyatt, 1 De G. & Sm. 125. *(f)* Bailey v. Collett, 18 Beav. 179.

(e) Ex parte Manning, 2 P. Wms. 410; Child v. Ld. Abingdon, 1 Ves. jr. 94; *(h)* Trefusis v. Ld. Clinton, 2 Sim. 359;

Davy v. Barber, 2 Atk. 489; Blount v. Blount, 3 Atk. 636; Champernowne v. Brooke, 3 Cl. & Fin. 1; 4 Cl. & Fin. 15; Growsock v. Smith, 3 Ans. 877, which *qu.*

(i) Dyer v. Hargreave, 10 Ves. 505.

(1) See the cases considered in Appendix, No. 2.

to be made for income tax,^(k) although it will be allowed in account.^(l)

17. Where an annuity is sold by the court, the purchaser is entitled to receive the annuity from the period when he could have confirmed the report, and pays interest from that day.^(m)

18. In *Kenny v. Wenham*, a life annuity was sold by private contract on the 18th of April, 1818, for 280*l.*, to be paid by instalments; 200*l.* in October, 1818, and the residue on or before 1st January, 1819; it was held that the purchaser was entitled to the annuity from the time of payment of the last, and not from that of the first instalment of the price.⁽ⁿ⁾

19. If, subsequently to a written contract, an agreement be made that the purchaser shall pay interest on the purchase money from a particular time, and the agreement is reduced into writing, but signed by the vendor only; yet, if the contract has been in part performed, the purchaser will be bound by the subsequent agreement.^(o) In one case, under a railway act, where the money was paid into court pending an investigation of title, a stipulation or demand of the seller at the time for interest in respect of which the company was silent, was held to bind them.^(p)

* 20. If a purchaser make payments to a seller exceeding the interest due on the purchase money, of course rests must be made, and the balance only will carry interest.^(q)

21. If a tenant for years, at a rent, with an option to purchase the fee, declare his option, he is entitled to retain the rent from that time, and in lieu of it must be charged with interest upon his purchase money.^(r)

22. And where a purchaser has not been in possession of the estate, and the seller receives interest, he will be compelled to pay not only the rent which he has received, but that which with-

(k) *Sherwin v. Shakspear*, 5 De G., M. & G. 517. Wales Ry. Co. 10 Hare, 113, where an agreement to pay interest till the purchase should be completed was held to mean

(l) *Bebb v. Bunny*, 1 K. & J. 216.

(m) *Twigg v. Fifield*, 13 Ves. 517; see until completed on the part of the purchaser by payment of purchase money, *qu.*

p. 104, *sup.*

(n) 6 Mad. 355.

(o) *Owen v. Davies*, 1 Ves. 82.

(p) *Ex parte Earl of Hardwicke*, 1 De G., M. & G. 297; see *Lewis v. South* 271. (q) *Griffith v. Heaton*, 1 Sim. & Stu. 271. (r) *Townley v. Bedwell*, 14 Ves. 591.

out his wilful default he might have received; (s) but where the tenants had received notice to quit, but with permission to remain till the property was sold, and this was stated in the conditions, and the purchaser was to receive the rents from a day named, it was not deemed a wilful default in the seller not having turned out the tenants, when the sale was made, although they had sublet at an increased rent. (t) Where a purchase is set aside, the purchaser will be made to refund only the rents which he has received.

23. Where the contract had been delayed upwards of fifteen years, by the default of the seller, who had received one third of the purchase money, and also all the rents of the estate, he was compelled to account not only for the rents, but for interest at four per cent. upon one third of them. (u)

24. Where, however, interest is more in amount than the rents and profits, and it is clearly made out that the delay was occasioned by the vendor, to give effect to the general rule would be to enable the vendor to profit by his own wrong; and the court therefore gives the vendor no interest, but leaves him in possession of the interim rents and profits; (x) and where a good title is not shown until a given period, the purchaser will pay interest only from that period, and he will, of course, take the rents from the same time.

25. But where there is an *express stipulation*, that if the conveyance is not executed, and the purchase money paid by the day named, interest shall be paid until the purchase is completed, the terms of that stipulation apply to every delay. (y) This was decided by Leach V. C. in the case of *Esdaile v. Stephenson*, where it was stipulated that, if the conveyance was not executed, and the *purchase money paid on or before a day named, the purchaser should pay interest on the purchase money at five per

(s) *Acland v. Gaisford*, 2 Mad. 28; *Wilson v. Clapham*, MS.; 1 J. & W. 36; *Blennerhasset v. M'Namara*, 1 Mo. 81.

(t) *Crosse v. Duke of Beaufort*, 5 De G. & Sm. 7.

(u) *Burton v. Todd*, *Todd v. Gee*, 31 Mar. 1818, MS. App. Purch. No. 22; 1 Swan. 260; *Lacon v. Mertins*, 3 Atk. 1; 12 Ves. 28; *Wilde v. Fort*, 4 Taunt. 334; *Lloyd v. Jones*, 12 Sim. 491; *Townshend v. Townshend*, 2 Rus. 308.

(x) *Esdaile v. Stephenson*, 1 Sim. & Stu. 122; *Paton v. Rogers*, 6 Mad. 256; *Jones v. Mudd*, 4 Rus. 118; *Collard v. Roe*, 4 De G. & J. 525.

(y) *Esdaile v. Stephenson*, 1 Sim. & Stu. 122.

cent. until the purchase should be completed, and the V. C. held that the interest depended upon the express stipulation of the parties, and the terms of that stipulation applied to every delay, however occasioned. The V. C. stated the *general* rule, as it is quoted in the preceding paragraph, and that general rule was followed in the case of *Jones v. Mudd*,^(z) where there was no stipulation for interest on the purchase money (although there was for it as mortgage money when so secured), and the delay was with the seller, and therefore interest was given only from the time the title was made; Lord Lyndhurst, in affirming the decree, expressed his assent "to the rule" as stated in *Esdaile v. Stephenson*. Lord Cottenham, in one case, observed that *Jones and Mudd* cannot be reconciled with *Esdaile v. Stephenson*, or indeed with *Monk and Huskisson*, to which we shall presently refer.⁽¹⁾ It is difficult to see how *Jones v. Mudd* runs adverse to *Esdaile v. Stephenson*, for in *Jones v. Mudd* there was no stipulation for interest on the purchase money; the case depended upon the general rule, and appears to have been properly decided. *Esdaile v. Stephenson* depended upon the *contract* for interest. In a case before Lord Cottenham, where possession and receipt of rents and payment of interest were provided for on and after a day fixed, although the purchase was not completed for a long time afterwards, and the purchaser took and then abandoned possession, and a receiver was appointed, — as there was no great delay in procuring a release from a jointress, — the purchaser was compelled to pay interest from the time he took possession. The fact of possession was of no consequence, because the parties had *contracted*.^(a) To some extent, therefore, *Esdaile v. Stephenson* was followed.

26. In *Esdaile v. Stephenson* the simple contract for interest prevailed; yet in the much stronger case of *Monk v. Huskisson*,^(b) where the contract fixed a day for the conveyance to be executed, and provided for payment of the purchase money, and the right of the purchaser to the rents from that day, and provided that if, by reason "of any unforeseen or unavoidable obsta-

(z) *Supra*.(a) *Portman v. Mill*, 3 Jur. 357.

(b) 4 Rus. 121, n.

(1) *Jones and Mudd* has no bearing upon *Monk and Huskisson*, where the contract was wholly different.

cles," the conveyance could not be perfected for execution on the day named, the purchaser should pay interest for the purchase money from that day at five per cent., and take the rents, Sir John Leach gave the sellers interest only from the time when a good title was shown; and he held, in opposition to his former decision, that the stipulation was not to give interest when interest would otherwise not have been payable, but to fix the rate of the interest at 5*l.* per cent. instead of 4*l.*

* 27. Lord Cottenham is reported to have said, that he could not see how the court could come to that conclusion in *Monk v. Huskisson*.(c) The writer always thought the decision wrong; it was impossible to maintain that the only object was to fix the rate of interest at 5*l.* per cent. instead of 4*l.*; if such had been the intention, a very different provision would have been inserted. Nevertheless it has been decided that a condition for payment of interest, if by reason of any "*unavoidable obstacle*" the contract could not be completed by a day named, did not apply to a delay occasioned by the state of the title, and therefore interest was not payable under the condition.(d) The like rule was applied by Lord Cottenham, where (e) the conditions of a sale by the court made time of the essence of the contract, and the purchase money was to be paid and possession given, or the rents, as from a day named; but if the purchaser should fail in making such payment at the time, then, "*from whatever cause the delay might have arisen,*" he was to pay interest at 5*l.* per cent., and the vendors were, within a time fixed, to deliver an abstract. The abstract was not delivered within the time, nor was the title made out for some time. *Wigram V. C.* decided that interest was payable, according to the contract, as delay "*from any cause whatever*" included the act of the vendor. Upon an appeal, Lord Cottenham in effect overruled *Esdale v. Stephenson*, and held that the words "*from any cause whatever*" mean some cause not provided for by the contract, and do not provide for either of the parties breaking the contract, as the vendor did in

(c) See *Portman v. Mill*, 3 Jur. 358.

(d) *Birch v. Podmore*, V. C., 1828; *Seton Decrees*, 213 a (2).

(e) *De Visme v. De Visme*, 1 Mac. & G. 336; *Wallis v. Sarel*, 5 De G. & Sm.

429; *Cowpe v. Bakewell*, 13 Beav. 421;

Litchfield v. Brown, 23 L. J. N. S. 176, where a good title had been shown in time; *Storry v. Walsh*, 18 Beav. 558.

this case by not delivering his abstract in time.(1) And this was followed in a later case,(f) where on a sale by the court the purchaser was to pay his purchase money on a day fixed, and if he did not do so, "from any cause whatever," he was to pay interest at 5*l.* per cent.; the master of the rolls held that the vendor was entitled to interest on the purchase money only from the confirmation of the master's report of a good title. Here, then, although it appeared that the purchaser himself was guilty of delay, the condition providing for delay "from any cause whatever" was wholly disregarded.

28. And again, where a day was appointed for the payment of the purchase money and the execution of the conveyance, but in case of default in payment of the purchase money on that day, the purchaser * was to pay to the vendor interest on the purchase money at four per cent., as the title, in the view of the court, was not completed till after the suit was instituted, it was held that interest was not payable by the purchaser, and this, although the subject of the sale was an advowson.(g)

29. These cases, in effect, denied to express words their fair meaning. But where there was no culpable delay on the part of the seller, and the stipulation was for interest from a day named, with a condition that under no circumstances whatever should the purchaser be excused from paying interest from that day, the seller was held entitled to interest, although the purchase could not be completed at the day. Indeed, in the case now referred to, interest would have been payable under a simple stipulation.(h) Lord Langdale hoped that *De Visme's* case had settled the point, but it was nevertheless necessary that that case should be acted on with some caution, otherwise no negotiation could take place for the purpose of satisfying the purchaser as to the title without entangling the vendor in a question of interest. It could not be laid down that, in all cases where a sufficient abstract was not delivered, in time the vendor was to lose the interest which he had stipulated for. In the later case of

(f) *Robertson v. Skelton*, 12 Beav. 363; 19 L. J. N. S. 140; *Denning v. Henderson*, acc. 12 Jur. 89.

(g) *Weddall v. Nixon*, 17 Beav. 160.

(h) *Rowley v. Adams*, 12 Beav. 476.

(1) The L. C. thought if interest was payable, the purchaser would be entitled to damages; *sed qu.*

Sherwin v. Shakespear,⁽ⁱ⁾ at the rolls, there was a condition, that "if from any cause whatever" the purchase should not be completed on the 25th April, 1844, the purchaser should pay interest at four per cent. from that day until the completion of the purchase: subsequent conditions provided for the delivery of an abstract, &c., and of the conveyance, showing that the contract was to be completed on the 25th April. The master of the rolls considered that the title was not made out until July, 1847. The seller was driven to file a bill, and had the costs of it, but still was denied interest previously to July, 1847. The learned judge did not lay it down as a general rule, where there was such a condition as above, that interest should only be paid from the time the title is made out; but the vendor should not take advantage of his own wrong. It was not essential that fraud in the vendor should be proved, or that the default made by him be wilful. Delay, the result of gross negligence, or, if the vendor might have remedied the difficulty in the title, would prevent him from obtaining more interest than he would otherwise have been entitled to, *e. g.* suppose a difficulty and delay from the incorrect statement of a name in a certificate of burial, the court could not know that the vendor was not aware of the error: so upon a question of identity of parcels. Delay owing to the default of the vendor in making out the title, dispenses with the condition as to interest. But if it is incontestably proved that it was a mere case of accident, or a thing that the vendor *could not have guarded against, then he would be entitled to the benefit of the condition. These observations show how difficult it was to maintain the rule in *De Visme's* case.

30. In a former edition of this work it was stated, that "where the delay is occasioned by the state of the title, and is not wilful, that seems to fall within the provision of 'any cause whatever.' *But that provision cannot now be relied upon to that extent.*" The decision at the rolls, in *Sherwin v. Shakespear*, which we have just considered, showed that this caution was necessary; but upon appeal, the decree at the rolls was reversed, and the true rule restored, giving to the words their full import, where there is no vexatious conduct or dealing in bad faith or gross negligence on the part of the vendor; and one of the learned

(i) 17 Beav. 267, *vide sup.* p. 424.

lords justices agreed in the proposition above quoted *without any qualification whatever.*(j) In a later case,(k) where interest was to be paid, if from any cause whatsoever the purchase should not be completed at the day named, until the purchase should be completed; the death of the vendor, just as the conveyance was ready for execution was held to be no excuse for nonpayment of interest. The vendor devised the estate to an infant, which rendered a suit necessary, and the purchase money was paid in generally in the cause, and not invested, and this, it was held, did not stop the payment of interest. This in practice should not be lost sight of. In a still later case V. C. Stuart, who adopted Lord Cottenham's view to the extent that interest would not be payable where the purchaser is prevented from performing his part of the contract by the acts of the vendor, yet held the stipulation to be binding, where, although there had been considerable delay, neither party in his view was to blame for the delay.(l) Lastly, the master of the rolls, in *Vickers v. Hand*,(m) stated that in *Sherwin v. Shakespear* he had followed Lord Cottenham's decision in *De Visme v. De Visme*, which had since been overruled, and therefore he held that where there had been no fraud or wilful delay, but the delay had arisen from the state of the title, the purchaser was liable to interest under the condition.(m¹)

31. If, however, a purchaser agree that if the completion of the purchase should be delayed on his part beyond a given day he will pay interest, and then make default, and when he is ready a trustee for the vendor refuse to join, the purchaser is liable to interest only from the day named until he was ready.(n)

(j) 5 De G., M. & G. 517, 2 Eq. R. 957, and *Ex parte Dean and Chapter of Durham*, 2 Jur. N. S. 345; [*Williams v. Glenton*, L. R. 1 Ch. Ap. 200, 206; 2 Dart V. & P. (4th Eng. ed.) 586, 587; *Lord Palmerston v. Turner*, 33 Beav. 524.]

(k) *Bannerman v. Clarke*, 3 Drew. 632, 26 L. J. N. S. 77; see the judgment for the exceptions.

(l) *Tewart v. Lawson*, 3 Sm. & Gif. 307.

(m) 26 Beav. 630.

(m¹) [See *Williams v. Glenton*, L. R. 1 Ch. Ap. 200; S. C. 34 Beav. 528. In this

case Lord Justice Turner appears to have considered that there was no obligation on a vendor to enter into litigation with an adverse claimant in order to perfect his title; L. R. 1 Ch. Ap. 208; "but," Mr. Dart adds, "it is conceived that this observation must have been intended to apply only to cases where the vendor, at the time of entering into the contract, is not aware of any adverse claim which may probably give rise to litigation." 2 Dart V. & P. (4th Eng. ed.) 587.

(n) *Parry v. Smith*, 1 Car. & Mar. 554.

32. In *Oxenden v. Lord Falmouth*,^(o) the condition was, that if **from any cause whatever (except the wilful default of the vendor)* the completion of the purchase made by any purchaser should be delayed beyond the 26th of December, *the purchasers respectively so making delay* (1) should pay interest to the vendor, after the rate of five per cent., from that time till the completion of the purchase. The purchaser, when the time appointed for completing the contract arrived, insisted that the contract was no longer binding, and took several objections. The vendor filed a bill for a specific performance, and the master reported that a good title was shown before the filing of the bill. Exceptions were taken both as to the title and the time of showing it. The former exception was overruled, but the latter allowed. But as the vice chancellor considered that the suit was rendered necessary by the conduct of the purchaser, independently of title, he held that there was no *wilful default* within the meaning of the condition, and therefore that interest at five per cent. was payable from the day named. In *Birch v. Podmore*, where the payment of interest was made to depend upon some *unavoidable obstacle*, the clearing up of the title was not deemed one; whilst in this case of *Oxenden v. Lord Falmouth*, the same act was not deemed a *wilful default*, so as to defeat the seller's right, under a stipulation for interest, whatever might be the cause of delay, except the seller's wilful default.

33. In a case where a public-house was sold, with the goodwill and the licenses,^(p) and the furniture, stock, &c., were to be taken at a valuation, and the purchase to be completed at a day named, but the seller continued to carry on the trade beyond that day, although the valuations were made, the purchaser objecting to the title, it was decided that the purchaser was not liable for the transactions of the trade, and was only to pay for so much of the original stock in trade as could be delivered to him; but he was charged with the rent and other outgoings of the premises since the time appointed for performance of the contract,

(o) V. C. 13 Nov. 1833, MS.; *Greenwood v. Churchill*, 8 Beav. 413.

(p) As to a license, see *Modley v. Snowball*, 29 Beav. 641.

(1) These words seem to import that the delay should be one attributable to the purchaser.

with interest thereon, and he was refused an occupation rent which he claimed from the seller.(q)

34. The purchaser never pays interest on the deposit, although by his default the seller may have been prevented from receiving it from the auctioneer.(r)

35. Nor is the seller generally liable for interest on the deposit where it has been paid to him, if the contract proceed.(s)

*36. It sometimes happens, that part of the purchase money is left in the hands of the purchaser, for the purpose of paying off incumbrances at some distant period; and, in that case, the purchaser must pay interest for it to the vendor.(t) In *Comer v. Walkley*,(u) it appeared that a sum was left in the purchaser's hands, at interest, as an indemnity against an incumbrance. The purchaser afterwards paid part of the sum to the vendor; notwithstanding which, the purchaser and his devisees continued to pay interest on the whole for many years. A bill was at length filed to compel payment of the residue of the sum deposited; and the mistake being admitted, the master was directed to take annual rests of the overpayments, and to compute interest thereon at five per cent., and the amount of the overpayment and interest to be deducted from the sum which would be found due from the purchaser.

37. Where a purchaser is entitled to recover at law a deposit paid by him to the vendor, he can also recover interest on it from the time it was paid, without an express agreement.(u¹)

38. But where he proceeds against the auctioneer to whom the deposit was paid, he cannot recover interest.(u²) An auctioneer ought not to be liable generally to interest: for an auctioneer is bound to keep a deposit till the execution of the contract, as a banker or depositary of it: for which reason, if he actually made interest of it, he ought not to be compelled to pay

(q) *Dakin v. Cope*, 2 Rus. 170.

(u) Reg. lib. A, 1784, fol. 625.

(r) *Bridges v. Robinson*, 3 Mer. 694.

(u¹) [*Teaffe v. Simmons*, 11 Allen, 342,

(s) But see *In re Page*, 1 Dru. & Wal. 343, 344.]

31, et qu.

(u²) [See *Teaffe v. Simmons*, 11 Allen,

(t) *Hughes v. Kearney*, 1 Sch. & Lef. 343, 344.]

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interest.(x) And it is unimportant that the seller, without the concurrence of the purchaser, gave him notice to invest the deposit.(y)

39. If interest be in any case recovered against an auctioneer, and he himself be not in fault, he may recover it from the vendor; (z) and where the statute of limitations has run, and it is pleaded, but the auctioneer pays the deposit into court, he cannot be compelled to pay interest; although, but for the statute, the deposit would have carried interest, as the payment of the principal does not raise any implied promise to pay the interest.(a) But where the principal has not become due, time will not run against the interest payable in respect of it; therefore, if there has been a long delay, and the time for completion has not arrived, but the principal remains unbarred, the interest will be computed from the contract, and not be confined to six years.(b)

40. But where the purchaser recovers the deposit only from the *auctioneer, he may, in an action against the seller, recover interest on it, and the expenses of investigating the title under an averment of special damage.(c)

41. If a vendor cannot make a good title, and the purchaser's money has been lying ready, without interest being made by it, the vendor must pay interest to the purchaser.(d) The cases at law are not easily reconcilable.(e) But the legal right to recover, in a proper case, seems to be established by the authorities.

42. By the 3 & 4 W. 4, c. 42 (f) it is enacted, that upon all

(x) *Ld. Salisbury v. Wilkinson*, 8 Ves. 48; 3 Bro. C. C. 43; 14 Ves. 509; *Browne v. Southhouse*, 3 Bro. C. C. 107; *sed vide Willis v. Commiss. of Appeals*, 5 East, 22; *Gaby v. Driver*, 2 Yo. & Jer. 549.

(y) *Harrington v. Hoggart*, 1 B. & Ad. 577. [See *Edgell v. Edgell*, L. R. 1 C. P. 80.]

(z) *Spurrier v. Elderton*, 5 Esp. 1. *Qu.* if the case can arise after the decision in *Harrington v. Hoggart*?

(a) *Collyer v. Willock*, 4 Bing. 313; 12 Mo. 557.

(b) *Toft v. Stephenson*, 5 De G., M. & G. 735.

(c) *Farquhar v. Farley*, 7 Taunt. 592; 1 Mo. 322.

(d) *Fleureau v. Thornhill*, 2 Black. 1078; *Robinson v. Harman*, 1 Ex. 850. [See *Hepburn v. Dunlap*, 1 Wheat. 179; *Williams v. Rogers*, 2 Dana, 375.]

(e) *De Haviland v. Bowerbank*; *Crockford v. Winter*, 1 Ca. 50, 124; *De Bernales v. Fuller*, 2 Ca. 426; *Calton v. Bragg*, 15 East, 213; *De Bernales v. Wood*, 3 Ca. 258; *Bradshaw v. Bennett*, 5 C. & P. 48; *Fruhling v. Schroeder*, 2 Bing. N. C. 77; *Maberly v. Robins*, 1 Mars. 260.

(f) S. 28; *Hyde v. Price*, 8 Sim. 578;

debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debt or sums certain were payable, if such debt or sums be payable by virtue of some written instrument at a certain time; or if payable otherwise, then from the time *when demand of payment shall have been made in writing*, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment, with a proviso, that interest shall be payable in all cases in which it is now payable by law.^(f¹) This statute leaves the matter of interest entirely in the discretion of the jury. Whether they can give interest upon interest may well be doubted.^(g)

43. Where the biddings upon a sale by the court are opened, the purchaser will in a proper case be allowed interest at the rate of *four per cent. per annum*, on such part of the purchase moneys as the court shall find to have lain dead.^(h)

44. But if a purchaser under a decree might have avoided the purchase upon a collateral ground, upon which he ultimately succeeds, he cannot, if his purchase money, although paid in, has not produced interest, recover any interest pending his unnecessary investigation of title.⁽ⁱ⁾

C. C. 193; Att. Gen. v. Corp. of Ludlow, 1 Hall & Tw. 216; Hull & Selby Ry. Co. v. North Eastern Ry. Co. 6 De G., M. & G. 872.

(f¹) [See Chitty Contr. (10th Am. ed.) 713 *et seq.* & notes.]

(g) Attwood v. Taylor, 1 Man. & Gra. 279. [A special case must always be made for the allowance of compound interest. See Armstrong v. Campbell, 3 Yerger, 201; Ringgold v. Ringgold, 1 Harr. 29, 111; Chitty Contr. (10th Am. ed.) 718, note (t), and cases cited; 2 Dan. Ch. Pr. (4th Am. ed.) 1259, n. (6), and cases; Wilcox v. Howland, 22 Pick. 169; Ferry v. Ferry, 2 Cush. 92, 97; Camp v. Bates, 11 Conn. 488; Mowry v. Bishop, 5 Paige, 98, 102; Pindall v. Bank of Marietta, 10 Leigh, 481; Howe v. Bradley, 19 Maine, 31, 36, 40; Sparks v. Garrigues, 1 Binney, 152, 165; Connecticut v. Jack-

son, 1 John. Ch. 13, 16, 17; Quackenbush v. Leonard, 9 Paige, 334, 345; Austin v. Imus, 23 Vt. 286; Talliaferro v. King, 9 Dana, 331; Stone v. Bennett, 8 Missou. 41, 45; Gibbs v. Chisolm, 2 Nott & McC. 38; Fobes v. Cantfield, 3 Ham. 17; Harvey v. Crawford, 2 Blackf. 43; Niles v. Board of Comm. Sink. Fund, 8 Blackf. 158; Fitzhugh v. McPherson, 3 Gill, 408; Dow v. Drew, 3 N. H. 40; Hollister v. Barkley, 11 N. H. 501, 511, 512; Pinckard v. Ponder, 6 Geo. 253; Otis v. Lindsey, 1 Fairf. 315. For a statement of the principles on which compound interest is allowed, see Lord Hatherley in Burdick v. Garrick, L. R. 5 Ct. Ap. 233, 241; Atty. General v. Alford, 4 De. G., M. & J. 843.]

(h) This was directed on opening the bidding for General Birch's estate, MS.

(i) Magennis v. Fallon, 2 Mol. 592.

45. Where the purchaser pays into court a sum of money on account, and in part of the purchase money, which is invested at the request of the vendor, *(k)* it is the money of the vendor, who is to take the chance of the rise or fall of the stocks. *(l)*

* 46. If a vendor file a bill for a specific performance, and cannot make a title, so that his bill is dismissed, yet the court has full jurisdiction over him, and therefore, if he have received a deposit, will compel him to repay it with interest. This was first decided by Lord Eldon in *Hayes v. Bailey*, and was followed in *Lord Anson v. Hodges*. *(m)* So where he has entered into an undertaking upon obtaining an injunction. *(n)*

47. Interest will not be payable on instalments of interest, although payment of them has been delayed by the purchaser's obtaining an injunction in a suit which is ultimately dismissed. *(o)*

48. But where, pending a suit, the payments of interest, under a contract, are ordered to be suspended till the hearing, the court will compel the payment of the instalments due by the purchaser at the hearing, although his bill is dismissed, but interest on them cannot be given. *(p)*

49. And where a purchaser obtained an injunction against execution, upon payment of a portion of the purchase money into court to be invested, but it was not invested, and the bill

(k) This fact does not appear in the report of *Gell v. Watson*, MS.

(l) *Gell v. Watson*, 2 Sim. & Stu. 402; *Humphries v. Horne*, 3 Hare, 276.

(m) 5 Sim. 227; *Small v. Attwood*, 3 Yo. & Col. 105; *Humphries v. Horne*, 3 Hare, 276.

(n) *Royou v. Paul*, 28 L. J. N. S. 555.

(o) *Small v. Attwood*, 3 Yo. & Col. 105; *Attwood v. Taylor*, 1 Man. & Gra. 279. [See *Hastings v. Wiswall*, 8 Mass. 455; *Dean v. Williams*, 17 Mass. 417; *Von Hemert v. Porter*, 11 Met. 210; *Ferry v. Ferry*, 2 Cush. 92, 97, 98; 2 Dan. Ch. Pr. (4th Am. ed.) 1259, note (6), and cases cited; *Farwell v. Sturdivant*, 37 Maine, 308; *Stone v. Locke*, 46 Maine, 445; *Chitty Contr.* (10th Am. ed.) 718, note (t). It has been held in many

cases, that where the payment of the principal or of part of it, has been postponed to a more distant day than the interest which by agreement is to be paid at certain specified times, as annually or semi-annually, before the principal is due, interest is chargeable on each instalment of interest. *Kennon v. Dickens*, 1 Taylor, 231; *Austin v. Imus*, 23 Vt. 286; *Gibbs v. Chisolm*, 2 Nott & McC. 38; *Talliaferro v. King*, 9 Dana, 331; *Watkinson v. Root*, 4 Ham. 373; *Singleton v. Lewis*, 2 Hill (S. Car.), 408; *Pierce v. Rowe*, 1 N. H. 179; *Stone v. Bennett*, 8 Missou. 41, 45; *Farwell v. Sturdivant*, 37 Maine, 308; *Chitty Contr.* (10th Am. ed.) 718, 719, in note.]

(p) *Small v. Attwood*, 3 Yo. & Col. 105.

was ultimately dismissed, the seller was held to be entitled to interest.(g)

50. Of course the court, in dismissing a purchaser's bill to rescind the contract, cannot order the payment to the seller, the defendant, of any instalment of interest not then due; and although the decree be in the first instance in favor of the purchaser, but is afterwards reversed in the House of Lords, yet that does not carry on the suit, so as to enable the House or the court below to order payment of instalments accrued between the date of the decree and the period of its reversal; (r) but they may of course be recovered in an action at law.(s)

51. Where under a decree rescinding a contract, the purchaser obtains a transfer of stock bought with moneys paid into court by himself, to which the seller would be entitled if the contract were enforced, and afterwards the decree is reversed, the seller is entitled to the fund and the dividends received in the mean time; but if the purchaser sell the stock he will be responsible only for the amount, and not for the interest upon it.(t)

52. If a defendant in a suit relating to a contract be decreed to pay costs, which he obeys, and the decree is reversed, and the bill dismissed with costs, although he is of course entitled to the repayment of his costs, they will not carry interest.(u)

* 53. Where a purchase by a trustee is set aside, and the estate is restored to the *cestui que trust*, the purchaser is allowed interest on the money paid by him, and is compelled to pay a rent for the estate during his enjoyment of it.(x)

54. But where a sale is annulled on account of notice in the purchaser of a prior claim, and he is decreed to account for the rents, it seems that he shall not be charged with interest on the rents.(y)

55. Where a purchase was set aside on the ground of fraud, and the purchaser was decreed to pay an occupation rent, and to be repaid his purchase money and interest, and the rents exceeded the interest, annual rests were directed, so that the excess of rent beyond the interest might go in reduction of the

(g) *Humphries v. Horne*, 3 Hare, 276.

(t) *Small v. Attwood*, 3 Yo. & Col.

(r) *Small v. Attwood*, 3 Yo. & Col. 105.

(u) S. C.

105.

(s) *Attwood v. Taylor*, 1 Man. & Gra.

(x) *Infra*, ch. 20.

279.

(y) *Macartney v. Blackwood*, Ir. Term R. 602.

capital; after the annual rent should have liquidated the principal, there was to be merely an account of the rent without interest.(z)

56. An agreement, that if the purchase money were not paid at the time stipulated, the purchaser should pay a rent for the estate, exceeding the legal interest of the money, was not usurious.(a) And an agreement to sell an estate for a principal sum, which, *with interest* added thereto after the rate of 6*l.* per cent. per annum, for the time the notes had to run, was secured by certain promissory notes according to the contract, was held not to be an usurious contract.(b) Where it was attempted to convert a purchase into a loan in order to avoid it as usurious, the question was whether a debt had been incurred or a purchase made. A man might purchase a bond for less than the money due upon it, and might receive the whole with interest, and yet not be guilty of usury.(b¹) So a sale of a rent during a lease would not be usurious, although a calculation was made on the effect of the transaction, by which it appeared that provided the rent was punctually paid, it would repay the principal sum with interest and something more.(c) But these distinctions are no longer important as the usury laws have been repealed, except

(z) *Donovan v. Fricker*, Jac. 165. [In *Doggett v. Emerson*, 1 Wood. & M. 195, 204, Mr. Justice Woodbury said: "In cases where contracts are rescinded for mere mistakes, and the property sold was taken possession of by the vendee, and yielded a regular income, it has often been the practice to set off the income against the interest, and to go into no computations about either, till possession of the premises was given up. Such a rule is often more convenient and easy than just; and could never be equitable unless the property yielded a certain and considerable income. Where interest has in any such cases been given, it usually does not begin till a demand is made to refund the consideration."]

(a) *Spurrier v. Mayoss*, 1 Ves. jr. 527, 4 Bro. C. C. 28. [See 1 Dart V. & P. (4th Eng. ed.) 118. To constitute usury there must be substantially a lending and borrowing. *Heytle v. Logan*, 1 A. K.

Marsh. 530; *Talbot v. Warfield*, 3 J. J. *Marsh.* 84.]

(b) *Beete v. Bidgood*, 7 B. & C. 453; *Dowling v. Legh*, 3 J. & L. 716.

(b¹) [*Chitty Contr.* (10th Am. ed.) 772, note (o); *Judy v. Gerrard*, 4 McLean, 360; *Lafayette Bank v. The State Bank of Illinois*, 4 McLean, 208; *Orr v. Lacy*, 4 McLean, 243; *Ingalls v. Lee*, 9 Barb. 647; *Holeman v. Hobson*, 8 Humph. 127; *Cram v. Hendricks*, 7 Wend. 569; *Kent v. Walton*, 7 Wend. 256; *French v. Grindle*, 15 Maine, 163; *Farmer v. Sewall*, 16 Maine, 456; *Braman v. Hess*, 13 John. 52; *Munn v. Commission Co.* 15 John. 44; *Odell v. Cook*, 2 Bailey, 59; *Hansbrough v. Baylor*, 2 Munf. 36; *Whitworth v. Adams*, 5 Rand. 333; *Kenner v. Hord*, 2 Hen. & M. 14; *Staley v. Kneeland*, 1 Clarke, 30; *Western Reserve Bank v. Potter*, 1 Clarke, 432.]

(c) *Lukey v. O'Donnell*, 2 Sch. & Lef. 469, 742, 2 Sch. & Lef. 472, 473.

as regards acts done previously to the 10th August, 1854, the time of passing the act, to which the old law still applies. And where interest was then payable upon any contract, express or implied, for payment of the legal or current rate of interest, or where upon any debt or sum of money interest was then payable by any rule of law, the same rate of interest will be recoverable as if the act had not been passed.(d)

* 57. Where interest is recovered at law, it is always at the rate of five per cent.,(e) but in equity the rate of interest allowed is for four per cent.(f)

58. In *Dickenson v. Heron*,(g) at the time the purchaser took possession of the estate, it was agreed he should pay interest on the purchase money, but no rate was fixed. The purchase money, however, then produced five per cent., and it was understood between the parties that interest was to be paid at that rate; and although this understanding did not appear by any note or writing, the purchaser was decreed to pay interest at five per cent.

59. In a later case five per cent. was decreed to be paid, although the conditions of sale were silent as to interest. The purchaser was held to have accepted the title by taking possession; and the court said, that they thought where a purchaser withheld the money from the seller, he ought to pay such interest as the seller might have made of the money had it been paid to him, and that this had frequently been done by Lord Alvanley.(h) How-

(d) 17 & 18 Vict. c. 90.

(e) See now 3 & 4 Will. 4, c. 42, s. 28, *sup.* pl. 42, which leaves it to a jury to decide upon the rate in cases falling within the act.

(f) *Calcraft v. Roebuck*, 1 Ves. jr. 221; *Child v. Ld. Abingdon*, 1 Ves. jr. 94; *Comer v. Walkley*, Reg. lib. A, 1784, fol. 625; *Pollexfen v. Moore*, Reg. lib. B, 1745, fol. 283, at the bottom; *Smith v. Hibbard*, Ch. 11 July, 1789; *M'Queen v. Farquhar*, Reg. lib. B, 1804, fol. 1095; *Browne v. Fenton*, Rolls, June 23, 1807, MS.; *Ld. Rosslyn's judgment in Lloyd v. Collett*, 4 Ves. 609, n.; *Acland v. Gais-*

ford, 2 Mad. 28; *Bradshaw v. Midgeley*, V. C. 13 Nov. 1817, MS. [In the United States the rate of interest is usually regulated by statute. Interest is to be allowed according to the law of the place where contracts are made and to be performed. *Story Conf. Laws*, §§ 291-293; *Von Hemert v. Porter*, 11 Met. 210.]

(g) *Sup.*; *Waldron v. Forester*, Ex. 1804, 1807, MS.; *Gaskarth v. Ld. Lowther*, 12 Ves. 107, 503.

(h) *Burnell v. Brown*, Ld. C. Baron, at the Rolls, 7 Feb. 1820, MS.; 1 J. & W. 168.

ever, this is not the rule of the court of chancery, nor does the reasoning apply to times when the market rate of interest is below five per cent. Accordingly, in a case where the conditions of sale stipulated that the purchaser should be allowed five per cent. on the deposit if a title could not be made, but did not contain any other stipulation as to interest; after a decree in a bill by the seller for a specific performance, upon a motion to vary the minutes, by making the interest payable on the purchase money five per cent., the vice chancellor was of opinion that the general rule must prevail, and that the minutes of the decree were correct, confining the interest to four per cent., and gave the purchaser his costs of opposing the motion.(i)

60. The same rate of interest seems payable, whether the estate be sold by private agreement, or under a decree of a court of equity.

61. If an agreement stipulate that the purchase money shall be paid by instalments, with five per cent. interest, and by a subsequent agreement another arrangement is made as to the instalments, and that the last instalment shall remain secured by mortgage at four and one half per *cent., and the purchaser do not perform the second agreement, the interest will remain at five per cent.(k)

II. Of Deterioration.

62. As connected with interest, we may here observe, that if the completion of a purchase has been delayed by the state of the title, the court will compel the seller to make an allowance for any deterioration which the lands, hedges, and fences have suffered by unhusbandman-like conduct and mismanagement since the date of the contract.(l) If the seller improperly resists the contract, of course the case is stronger.(m)

63. But a purchaser is not entitled to any allowance for deterioration, after he took possession, or after there was a title

(i) Thorp v. Freer, H. T. 1820, MS.

(k) Attwood v. Taylor, 1 Man. & Gra.
279; Minchin v. Nance, 4 Beav. 332.

(l) Foster v. Deacon, 3 Mad. 394, and
several cases not reported. Lord v. Ste-

phens, 1 Yo. & Col. 222; [Townsend v.
Champernowne, 3 Yo. & Col. 508;] Car-
rodus v. Sharp, 20 Beav. 56.

(m) Regent Canal Co. v. Ware, 23
Beav. 575.

under which he ought to have taken possession under the contract.(n)

64. Where in a specific performance suit, the purchaser, who claimed an allowance for deterioration, paid his purchase money into court under an order, and the amount to be allowed for deterioration was afterwards fixed, he was held entitled to the amount, with interest from the time when he paid his money into court.(o)

65. Where pending the contract the possession of the estate becomes vacant, the seller, if the purchaser will not concur in an interim management to abide the result, may safely put a person into possession, and get in the crops, and the court will, if the merits are on the side of the seller, consider the possession as that of the purchaser, and relieve the seller from his liability without affecting his right to interest.

66. If pending the investigation of title, ornamental timber be cut down upon a residence, that is not a case for compensation, but the purchaser may be relieved from the contract.(p)

67. But a seller may, during a long investigation of title, cut down coppice wood at its full growth, for that is in due course of husbandry, although the money produced by it will belong to the purchaser.(q)

68. Of course timber blown down between the contract and conveyance will belong to the purchaser; (r) and ordinary timber cut down by the seller must be compensated for in money.(s) It is * obvious that ordinary timber might be cut to an extent and in situations which would induce the court, instead of giving common compensation, to release the purchaser from the contract.

69. In general, if after the contract and before the conveyance, the estate be improved, or if the value be lessened by the failure of tenants or otherwise, and no fault on either side, the vendee has the benefit or sustains the loss.(t) Unless a special case be

(n) *Binks v. Ld. Rokeby*, 2 Swan. 226; *Minchin v. Nance*, 4 Beav. 332.

(o) *Ferguson v. Tadman*, 1 Sim. 530.

(p) *Magennis v. Fallon*, 2 Mol. 584, 585.

(q) *Poole v. Shergold*, 1 Cox, 273; the singular arrangement in this case, deduct-

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ing the value of the growing coppice, must have been in consequence of no account of interest or rents having been given.

(r) *S. C.* 2 Bro. C. C. 118.

(s) *Magennis v. Fallon*, 2 Mol. 588.

(t) See 1 Mad. 539; *sup.* c. 7, sec. 2.

made, a vendor in possession cannot like a mortgagee be charged with what he might have received, "but for wilful default,"(u) and where it is necessary, he may justify reducing the rents;(x) but a seller receiving interest during the delay, would not be permitted to say, that because the estate was sold he had not used due diligence in getting in the rents.

70. A seller after a contract cannot expend money on improvements, and require the purchaser to pay for them;(y) therefore the decree should not contain an account of repairs and lasting improvements by the vendor whilst in possession.(z)

71. Where before the purchase is completed the tenant quits under an agreement with the purchaser, the purchaser must submit to the deterioration occasioned by the tenant's quitting, although the tenant acted under a mistake.(a)

72. Although a purchaser is bound by the contract to pay interest, yet if the conveyance be executed with a receipt for the purchase money, the seller is bound by his statement of the amount of the purchase money, and cannot claim any further money, although in point of fact, by mistake, the interest was miscalculated at less than the sum actually due.(b)

(u) *Sherwin v. Shakspear*, 5 De G., M. & G. 517; *Regent's Canal Co. v. Ware*, 23 Beav. 575.

(x) *Sherwin v. Shakspear*, *ubi sup.*

(y) 6 Hare, 296; 8 Hare, 60.

(z) *Sherwin v. Shakspear*, *ubi sup.*

(a) *Hartford v. Purrier*, 1 Mad. 532.

(b) *Harding v. Ambler*, 3 M. & W. 279.

[See *ante*, 158, note (b). The clause in a deed acknowledging the receipt of a certain sum of money, as the consideration of the conveyance or transfer, is open to explanation by parol proof. See *M'Crea v. Purmort*, 16 Wend. 460; *Lazell v. Lazell*, 12 Vt. 443. In regard to this clause, Mr. Justice Cowen, in *M'Crea v. Purmort*, 16 Wend. 460, 475, after a review of many of the leading authorities in England and in the United States, says in conclusion: "Looking at the strong and overwhelming balance of authority, as collected from the decisions of the American courts, the clause in question even as between the immediate parties, comes down to the

rank of *prima facie* evidence, except for the purpose of giving effect to the operative words of the conveyance. To that end and that alone it is conclusive. Such effect I have no doubt has long been ascribed to it by conveyancers and dealers in real estate. It is a construction that violates no rule of law, but harmonizes with well settled principles, and should be steadily maintained and applied whenever the ends of substantial justice may require it." This acknowledgment of consideration estops the grantor from alleging that the deed was executed without consideration; prevents a resulting trust in him, and forever debars him from denying the deed for the uses therein mentioned; but for every other purpose it is open to explanation, and may be varied by parol proof. *M'Crea v. Purmort*, 16 Wend. 460; *Belden v. Seymour*, 8 Conn. 304; *Shepherd v. Little*, 14 John. 210; *Taggart v. Stanbery*, 2 McLean, 543; *Wilkinson v. Scott*, 17 Mass. 249; *Goodwin*

SECTION II.

OF COSTS.

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| <ol style="list-style-type: none"> 1. Costs at law and in equity: trustees. 2. In equity, do not follow the event of the cause. 3. Purchaser's bill: no title. 5. Vendor's bill: no title and misrepresentation. 6. Vendor's bill: no title. 7. Report of good title, but considered too doubtful. 8. Costs of objections abandoned at the hearing. 9. Bad title only <i>prima facie</i> case for costs. * 10. Costs of objections overruled, where report is against the title. | <ol style="list-style-type: none"> 11. Improper suit by seller proper one by purchaser. 12. Opinion at law against the title after master's report <i>contra</i>. 13. Opinion at law in favor of title, but on general view held bad. 14. Good title, not till after bill filed. 15. Costs of case at law for the title after master's report also for it. 16. Title made contrary to abstract: purchaser's acquiescence. 17. Untenable grounds on both sides. 18. Costs of appeal where title doubtful. 19. Purchaser may take fair objection. — |
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v. Gilbert, 9 Mass. 510, 514; *Bullard v. Briggs*, 7 Pick. 533; *Griswold v. Messenger*, 6 Pick. 517; *Basford v. Pearson*, 9 Allen, 387, 390, 391; *Whitbeck v. Whitbeck*, 9 Cowen, 266; *Sinclair v. Jackson*, 8 Cowen, 543; *Bowen v. Bell*, 20 John. 328; *Morse v. Shattuck*, 4 N. H. 229; *Pritchard v. Brown*, 4 N. H. 397; *Scoby Blanchard*, 3 N. H. 170; *Buffum v. Green*, 5 N. H. 71, 82; *Schillinger v. McCann*, 6 Greenl. 364; *O'Neal v. Lodge*, 3 Harr. & M'H. 433; *Harvey v. Alexander*, 1 Rand. 219; *Hamilton v. M'Guire*, 3 Serg. & R. 355; *Weigley v. Weir*, 7 Serg. & R. 309; *Watson v. Blane*, 12 Serg. & R. 131, 137; *Hutchinson v. Sinclair*, 7 Monroe, 291, 293; *Gully v. Grubbs*, 1 J. J. Marsh. 388-390; *Higdon v. Thomas*, 1 Harr. & G. 139, 145; *Curry v. Syles*, 2 Hill, 404; *Steele v. Worthington*, 2 Ham. 182, 187; *Swisher v. Swisher*, Wright, 755, 756; *Lingan v. Henderson*, 1 Bland, 249; *Burbank v. Gould*, 15 Maine, 118; *Cummings v. Jennett*, 26 Maine, 397; *Speer v. Speer*, 1 McCarter (N. J.), 240; *Gibson v. Fifer*, 21 Texas, 260; *Elder v. Hood*, 38 Ill. 533; *Bratt v. Bratt*, 21 Md. 578; *Brown v. Maltbie*, 4 Stew. & P. 96; *Byers v. Mullen*, 9 Watts, 266; *Stackpole v. Robins*, 47 Barb. 212; *Tyler v. Carlton*,

7 Greenl. 175; *Emmons v. Littlefield*, 13 Maine, 233. An additional or a different consideration may be proved by parol. *Drury v. Tremont Improvement Co.* 13 Allen, 171; *Paige v. Sherman*, 6 Gray, 511; *Miller v. Goodwin*, 8 Gray, 542. The admissibility of parol testimony respecting the consideration of an agreement or deed, must depend in some measure on the purpose for which, and the parties between whom, the testimony is offered. *Morse v. Shattuck*, 4 N. H. 229, 231, 232; *Henderson v. Dodd*, 1 Bailey Eq. 138; *Kinzie v. Penrose*, 2 Scam. 516; *ante*, 161, note. In cases of memorandums under the statute of frauds, see *ante*, 134, n. (u). But in no case can parol evidence be introduced to disprove the existence of a consideration in order to create a resulting trust in the grantor, or otherwise to defeat the operation of the deed. *Graves v. Graves*, 29 N. H. 129; *Farrington v. Barr*, 29 N. H. 86; *Philbrook v. Delano*, 29 Maine, 410; *Leman v. Whitley*, 4 Russ. 423; *Randall v. Phillips*, 3 Mason, 388; *Moran v. Hayes*, 1 John. Ch. 339; *Alison v. Kurtz*, 2 Watts, 187; *Hutchinson v. Tindall*, 2 Green Ch. 357; *Wilkinson v. Wilkinson*, 2 Dev. Eq. 376; *post*, 702, § 11.] 102 Maine 533.

Opinion of counsel does not save costs.

— Where purchaser is misled.

20. Point decided in a former cause.

21. Doubtful fact, found against purchaser.

22. Necessary and unnecessary evidence required.

23. Materiality of further abstracts considered.

24. Where purchaser might have had the evidence.

25. Purchaser insisting contract is at an end.

26. Suit occasioned by purchaser's unfounded claim.

28. Frivolous objections.

29. Lots, and a good title to some, and all refused.

30. Possession by purchaser.

31. Set off: deposit and costs.

32. Suit occasioned by trustee.

33. Costs of unnecessary action.

34. Purchaser's conduct dishonorable.

35. Objection taken after waiver.

36. Inadequate price.

37. Improper allegation of fraud, &c.

38. Claim by plaintiff contrary to the contract.

40. Suit to make a title: death or lunacy of seller.

41. Suit occasioned by seller's misstatement.

42. Incumbrances preventing a title.

43. Determination of contract by seller, after bill filed.

44. Costs of sale by courts of equity.

45. Dismissal of bill with costs by House of Lords.

46. Motion to pay out purchase money.

1. At law, the costs abide the event of the action by the vendor or purchaser. In equity, also, the person who fails in the suit must *primâ facie* be deemed liable to the costs; (*a*¹) and it is not material that the seller is a trustee and not beneficially entitled to the property, (*a*) or that the purchaser is laying out trust money. And upon claims filed, the court had like jurisdiction over costs.

2. But costs in equity rest entirely in the breast of the court, for the *primâ facie* claim to costs may be rebutted by the particular circumstances of the case. (*b*)

(*a*¹) [Hunter v. Marlboro, 2 Wood. & M. 168; 2 Dan. Ch. Pr. (4th Am. ed.) 1381, & note; Saunders v. Frost, 5 Pick. 260; Clark v. Reed, 11 Pick. 446, 449; Bryant v. Russell, 23 Pick. 508; Tomlinson v. Ward, 2 Conn. 396; Lee v. Prindle, 12 Gill & J. 288; Burtón v. Fort, 18 Ark. 202; White v. Walker, 5 Florida, 478; Stone v. Locke, 48 Maine, 425. The costs the failing party is thus *primâ facie* liable to pay, are in general the entire costs of the litigation, where the prevailing party had good cause for his proceeding, although he may have failed as to part. Hunn v. Norton, 1 Hopk. 344; Woodson v. Palmer, 1 Bailey Eq. 95; Ward v. Davidson, 2 J. J. Marsh. 443; Shackelford v. Helm, 1 Dana, 338; Bradford v. Allen, Hardin, 1; Thomas

v. Fred. So. School, 9 Gill & J. 115; M'Connell v. M'Connell, 11 Vt. 290; Phillips v. Barbarcaux, 2 B. Mon. 89, 91. But in some cases where a party has failed as to part of his claim, he will not be allowed costs, although he has succeeded as to another part. Ten Eyck v. Holmes, 3 Sandf. Ch. 428; Sagory v. Dubois, 3 Sandf. Ch. 466; Rightger v. Stall, 3 Sandf. Ch. 608.]

(*a*) Edwards v. Harvey, Co. 40; Hill v. Morgan, 2 Mo. 460, a case of renewal.

(*b*) Vancouver v. Bliss, 11 Ves. 458; Scorbrough v. Burton, Barn. C. C. 255; Staines v. Morris, 1 Ves. & Bea. 15, 16; [Millington v. Fox, 3 M. & C. 338; Earl Nelson v. Lord Bridport, 10 Beav. 305; Bartlett v. Wood, 9 W. R. 817; Edelsten v. Edelsten, 1 De G., J. & S. 185; 9 Jur. N.

3. If a purchaser file a bill for a specific performance, which is dismissed because the defendant, the seller, cannot make a title; the rule is now to dismiss the bill without costs,^(c) and the purchaser's costs cannot be recovered in an action at law.^(d)

4. But if a purchaser file a bill for a specific performance, insisting that the seller cannot make a good title, he must pay the costs, whether he accept or refuse the title.^(e) If he file his

S. 479; *Kaye v. Bank of Louisville*, 9 Dana, 261, 264; *Tomlinson v. Ward*, 2 Conn. 396; *Hunt v. Lewin*, 4 Stew. & P. 138; *Randolph v. Rosser*, 7 Porter, 246; *Travis v. Waters*, 12 John. 500; *Method. Epis. Church v. Jaques*, 1 John. Ch. 65; *Cowles v. Whitman*, 10 Conn. 121; *Ferguson v. Wilson*, L. R. 2 Ch. Ap. 77, 92; *Patch v. Ward*, L. R. 3 Ch. Ap. 203; *Hilton v. Woods*, L. R. 4 Eq. 432. But in exercising its discretion on the question of costs, a court of equity is generally governed by certain fixed principles, which have been adopted upon the subject, and does not, as is frequently supposed, act upon the mere caprice of the judge before whom the case happens to be tried. 2 Dan. Ch. Pr. (4th Am. ed.) 1377, & notes; *Brooks v. Byam*, 2 Story, 553, 554; *Gray v. Gray*, 15 Ala. 779; *Coleman v. Moore*, 3 Litt. 355; *Tomlinson v. Ward*, 2 Conn. 296. The court does not consider the costs as a penalty or punishment but merely as a necessary consequence of a party having created a litigation in which he has failed. 2 Dan. Ch. Pr. (4th Am. ed.) 1377; *Lord Cranworth in Clarke v. Hart*, 6 H. L. Cas. 633; 5 Jur. N. S. 447, 453; see, also, *Wortham v. Lord Daere*, 2 K. & J. 437, 438; *Purser v. Darby*, 4 K. & J. 41; *Caton v. Caton*, L. R. 1 Ch. Ap. 137, 149; 12 Jur. N. S. 171, 175. Where both parties are equally innocent and endeavoring to avoid a loss caused by a third person, no costs will be awarded to either party against the other. *Pendleton v. Eaton*, 3 John. Ch. 69. So in cases of great novelty, or where the practice on the subject is unsettled, costs will not be allowed to either party. *Jones v. Mason*, 5 Rand. 577; *Hoffman v. Skinner*, 5 Paige, 526.

Nor where both parties have claimed what they were not entitled to, and each has succeeded as to part of the matters in litigation between them; *Crippen v. Hermance*, 9 Paige, 211; *Fairchild v. Hunt*, 1 McCarter (N. J.), 376. If it should appear that both parties are in fault, the court will not give costs to either party. *Clark v. Reed*, 11 Pick. 446, 449; *Saunders v. Frost*, 5 Pick. 259, 274; *Pinnock v. Clough*, 16 Vt. 500; *Caldwell v. Leiber*, 7 Paige, 483; *Dorsey v. Smith*, 7 Harr. & J. 345. Where the parties stand equally fair in every respect, the party who brings the other into court ought to pay the expenses of it. *Catlin v. Harned*, 3 John. Ch. 61. In proceedings in the nature of amicable suits costs are not decreed. *M'Connell v. M'Connell*, 11 Vt. 290. And inasmuch as costs in chancery do not necessarily follow a decree, there must not only be a decree in favor of a party, but there must also be an express order or decree for his costs as they are lost. *Connable v. Bucklin*, 2 Aik. 221; *Stone v. Locke*, 48 Maine, 425; see *Travis v. Waters*, 12 John. 500; S. C. 1 John. Ch. 85. Where the parties to a suit make a settlement between themselves out of court, without any arrangement as to costs, neither party is entitled to costs against his adversary: *Bruce v. Gale*, 2 Beasley (N. J.), 211; *Den v. Pidcock*, 7 Halst. 363; *Eastburn v. Kirk*, 2 John. Ch. 317.]

(c) *Maldon v. Fyson*, 9 Beav. 347; *Benet College v. Carey*, 3 Bro. C. C. 390; *Lewis v. Loxham*, 3 Mer. 429.

(d) *Malden v. Fyson*, 11 Q. B. 292.

(e) *Nielson v. Wordsworth*, 2 Swan. 365; *qu.*

bill with full knowledge of the objections, and the report is against the title, but he waive the objections, he must pay the costs of investigating the *title, but the seller must bear the other costs.(f) But where no abstract is produced until the parties are sent to chambers, and there the only defect in title shown is one which was known before the suit, yet the purchaser will have his further costs after the first hearing, for he was entitled to the inquiry as to title, and the cause must have again come before the court whatever the result might be.(g)

5. If the vendor file a bill for a specific performance, which is dismissed because he cannot make a title, and the estate was misrepresented in the particulars, although without fraud; he must pay the costs.(h) If the estate was misrepresented, and the auctioneer verbally agreed to allow a deduction if any misrepresentation should appear, the seller's bill would be dismissed with costs, if he sought to compel the purchaser to take the estate without any allowance, because that would be a fraud. If the purchaser do not resort to the defence set up by his answer until after the institution of the suit, that is a ground not to give costs.(i)

6. Where there is no misrepresentation, and the question turns upon a fair point of law, and the opinion of the court is in favor of the title but against forcing it on a purchaser, and the vendor's bill is dismissed, it may be without costs; (j) although if the court think the title clearly bad, it will dismiss the bill with costs,(k) even where the defect is occasioned by an accident after the contract, as where the title deeds were burnt.(l)

7. Where the report was in favor of the title, but upon exception the court thought it too doubtful, the seller's bill was dismissed, but without costs, returning to the purchaser his deposit on filing the exceptions.(m)

(f) *Bennett v. Fowler*, 2 Beav. 302.

(g) *Wilson v. Williams*, 3 Jur. N. S. 810.

(h) *Vancouver v. Bliss*, 11 Ves. 458.
[See *Butler v. O'Hear*, 1 Desaus. 382, 400.]

(i) *Winch v. Winchester*, 1 Ves. & Bea. 375.

(j) *Rose v. Calland*, 5 Ves. 186; *White v. Foljambe*, 11 Ves. 337, 463. [See

Washburn v. Bank of Bellows Falls, 19

Vt. 278; *Demarest v. Wynkoop*, 3 John.

Ch. 147; *Lamar v. Jones*, 3 Harr. & M'H. 328.]

(k) *Playford v. Hore*, 3 Yo. & Jer. 175.

(l) *Briant v. Busk*, 4 Russ. 1.

(m) *Willcox v. Bellaers*, Tur. & Rus. 491.

8. But where the bill is dismissed against the purchaser with costs, he will not be allowed costs of objections argued in chambers, but abandoned at the hearing.(n)

9. The title being bad, makes only a *prima facie* case for costs : in many cases, circumstances outweigh that.(o)

10. Where the bill was filed by the seller, and the title proved to be a bad one, the bill was dismissed with costs, although the purchaser had taken numerous objections before the master, and had succeeded only in one.(p)

* 11. Where a seller insisting that he had made a good title, filed a bill for a specific performance, in which suit the master reported that he could not make a good title, and the purchaser then filed his bill, insisting that certain accounts should be taken, which would enable a good title to be made, and the seller took an exception to the master's report in his cause, which was overruled, and ultimately a specific performance with a compensation was decreed in the second cause, the seller was compelled to pay the costs of both causes.(q)

12. In the case of *Bruce v. Bainbridge*,(r) where the bill was filed by the seller, the master's report was in favor of the title; a case was sent to the C. P., and the certificate was against the title. The bill was dismissed with costs, from the date of the master's report.

13. Where a purchaser, a defendant, disputed the power to

(n) *Hayes v. Bailey*, L. C. M. T. 1821, MS.

(o) *Edwards v. Harvey*, Co. 40; [*Monro v. Taylor*, 8 Hare, 51; *Abbott v. Sworder*, 4 De G. & S. 448, 460; *Sherwin v. Shakspear*, 17 Beav. 267; *Freer v. Hesse*, 4 De G., M. & G. 495. And it has been said that where there is a fair case for consideration, it is not the course to visit the party who fails with costs. 2 Dan. Ch. Pr. (4th Am. ed.) 1400, 1401. It seems, however, that the practice in such cases is to make the costs follow the result. *Carver v. Richards*, 6 Jur. N. S. 667; see, however, *Malden v. Fyson*, 9 Beav. 347. A vendee, entitled to specific performance of his contract, is entitled also to costs. *Hart v. Brand*, 1 A. K. Marsh. 162. But not where he has made no tender of the

purchase money. *Dustin v. Newcomer*, 8 Ohio, 49; see *Galloway v. Barr*, 12 Ohio, 354; *Swartwout v. Burr*, 1 Barb. 495. Where the suit was brought by the heirs of the purchaser against the heirs, executors, and trustees of the seller, and it appeared that the consideration had been paid, but there was no improper behavior or unjustifiable defence on the part of the defendants, specific performance was decreed, but with costs to neither party as against the other. *Dyer v. Potter*, 2 John. Ch. 152.]

(p) S. C.; *Townsend v. Champenowne*, 3 Yo. & Col. 505.

(q) *Burton v. Todd*, *Todd v. Gee*, 1 Swan. 255.

(r) V. C. 10 Aug. 1821, MS.

sell, and a case was directed to law, and the certificate was in favor of the title, but ultimately, upon the general view of the title in equity, the bill was dismissed, the purchaser was allowed the costs at law as part of the costs of the cause.(s)

14. If a good title is not shown until *after* the bill is filed, and the purchaser take no step inconsistent with the finding in chambers, the seller must pay the costs of the whole suit.(t) Where when the bill was filed by the seller he could not make a title on account of registered judgments, but *pendente lite* he could have made a title, as the judgments were not reregistered until some time after the five years, it was held that he must pay the costs of his suit; but it was considered that it would have been otherwise had he during the interval of non-registration offered to pay the purchaser's costs to that time, and to give him a conveyance. And although the judgments were a question of conveyance and not of title, yet as they had occasioned the suit, the costs fell on the seller.(u)

15. Where the master found that the seller could make a title in February, 1820, which was subsequently to filing the bill, and the purchaser took an exception, and elected to have a case sent to law, which was decided against him, and a specific performance was decreed, the purchaser was paid the costs up to February, 1820, but he paid the costs of the subsequent proceedings before the master and the costs of the case, and the vendor paid the costs of the hearing.(x)

16. If a seller, upon a reference to the master, establish his title * upon a different ground from what appeared in the abstract, the purchaser will be allowed the costs of the reference and the applications to the court.(y) So, where a purchaser might in the first instance have rescinded the contract, but binds himself by long acquiescence, the vendor will not be entitled to costs.(z)

(s) *Forbes v. Peacock*, 12 Sim. 549.

(t) *Annesley v. Muggerridge*, V. C. 12 Mar. 1825, MS.; *Osbaldeston v. Askew*, V. C. 11 Mar. 1829, MS.; *Townsend v. Champernowne*, 3 Yo. & Col. 505; *Wilkinson v. Hartley*, 15 Ves. 188; [*Jaboe v. McAtee*, 7 B. Mon. 279.]

(u) *Freer v. Hesse*, 2 Eq. R. 13; 4 De G., M. & G. 495.

(x) *Smith v. Leigh*, V. C. 10 Aug. 1821, MS.; *Lill v. Robinson*, Beat. 85; *Townsend v. Champernowne*, 3 Yo. & Col. 505.

(y) *Fielder v. Higginson*, 3 Ves. & Bea. 142.

(z) *Dickinson v. Heron*, *sup.* p. 680, n.

17. And if both parties have relied upon untenable grounds, although a specific performance is decreed, it may be without costs.(a) So if both parties sleep on their rights until it becomes necessary for the court to interfere, each party will be left to bear his own costs.(b)

18. If a seller appeal to the House of Lords with a view to compel the purchaser to accept a title, which that House thinks is not such a title as the purchaser was bound to accept, the appeal will be dismissed with costs.(c)

19. So a purchaser is considered as entitled to take a fair objection, and although it be overruled, yet the court will not on that ground give costs; (d) but this depends upon the weight due to the objection; (e) and he cannot avoid the costs, because he was supported by the opinion of counsel.(f) But if he be led to take an objection which the court overrules, by a statement in the abstract and the conduct of the seller's solicitor, that may be an excuse for costs.(g)

20. Where the objection to the title has already been decided in a former cause, of which the purchaser had notice, the purchaser will be decreed to pay the costs of the suit.(h)

21. And although a purchaser may fairly object to a title on the ground of a doubtful fact, yet if the fact is found against him, he cannot claim costs, although he will not be compelled to pay them.(i)

22. In a case where the master reported that the abstract delivered by the vendor before the filing of the bill was sufficient, but he found that the purchaser required certain evidence in support of the abstract, some of which was necessary, but not fur-

(a) *Sidebotham v. Barrington*, 5 Beav. 261; *Weddall v. Nixon*, 17 Beav. 160; *Carrodus v. Sharp*, 20 Beav. 56.

(b) *Wallis v. Bastard*, 4 De G., M. & G. 251.

(c) *Blosse v. Ld. Clanmorris*, 3 Bligh, 62.

(d) *Cox v. Chamberlain*, 4 Ves. 631; *Staines v. Morris*, 1 Ves. & Bea. 8; *Sharpe v. Roahde*, 2 Ro. 192.

(e) *Burnaby v. Griffin*, 3 Ves. 266; *Bishop of Winchester v. Paine*, 11 Ves. 195; *Powell v. Martyr*, 8 Ves. 146; *Fludyear v. Cocker*, 12 Ves. 25; *Calverley v. Williams*, 1 Ves. jr. 210; *M'Queen v. Farqu-*

har, 11 Ves. 467; *Thomas v. Townsend*, 16 Jur. 736. [Where the plaintiff had probable cause for seeking the aid of a court of equity, but failed in establishing his title; but the defendant showed none, or no better title to the property in dispute, the bill was dismissed without costs on either side. *Nicoll v. Huntington*, 1 John. Ch. 166, 182.]

(f) *Maling v. Hill*, 1 Cox, 186.

(g) *Dakin v. Cope*, 2 Russ. 170.

(h) *Biscoe v. Wilks*, 3 Mer. 456.

(i) *Thorpe v. Freer*, MS. 4 Mad. 466.

nished, and some not necessary, the lord chancellor held that both of the parties were in the wrong; and that no costs ought to be given on either side.^(k)

* 23. Where a seller does not make out his title until after the bill is filed, he is liable, as we have seen, to pay the costs of the suit up to the time that he showed a good title.^(l) But the court will not let this rule operate as a trap for the seller; and if further abstracts are furnished after the bill is filed, will inquire whether they are material. So as to evidence. But, as to evidence, much depends upon the fact whether further evidence was required by the purchaser. In one case an act of parliament, for releasing the estate from certain portions, was obtained after the filing of the bill. The master found that a good title was shown when the act was delivered to the purchaser. The purchaser claimed the costs to a later day, on the ground that the act recited a release by deed of other portions, an abstract of which had not been furnished. The vice chancellor held that the act was tantamount to an abstract, and that the purchaser should have called for an abstract of the deed, if he had intended to insist upon the want of it as an objection.^(m)

24. Where the purchaser might, if he pleased, have had the evidence furnished to him before the bill was filed, although the master reported that the title was not made out until the evidence was produced, the purchaser had to pay the costs.⁽ⁿ⁾ And in *Oxenden v. Lord Falmouth*,^(o) the court held that the suit became necessary by the improper conduct of the purchaser, and therefore the vice chancellor, although he had allowed as a fact that the title to a part of the estate was not shown until after the filing of the bill, yet held that as the purchaser's misconduct rendered the suit necessary, he must pay all the costs. In a later case,^(p) where the purchaser by an untenable objection

(k) *Newall v. Smith*, 1 J. & W. 263. [See *Crippen v. Hermance*, 9 Paige, 211.]

(l) *Wilson v. Allen*, 1 J. & W. 623, and many MS. cases; *Wynne v. Morgan*, 7 Ves. 202; *Collinge's case*, 3 Ves. & Bea. 143, n. (a); *Lewin v. Guest*, 1 Russ. 325; *sup. pl. 14.*

(m) *Emery v. Grocock*, 1821, MS.

(n) *Long v. Collier*, 4 Russ. 269; *Hol-*

wood v. Bailey, *Ib.* 271; *Townsend v. Champernowne*, 3 Yo. & Col. 505.

(o) 13 Nov. 1833, MS. *sup.* pp. 637, 638; *Monro v. Taylor*, 8 Hare, 70; 3 Mac. & G. 713; *Litchfield v. Brown*, 23 L. J. 176; *Sherwin v. Shakspear*, 17 Beav. 267; 5 De G., M. & G. 517; *Freer v. Hesse*, 2 Eq. R. 13; 4 De G., M. & G. 495.

(p) *M'Nicol v. Kay*, 28 L. J. 20.

rendered the suit necessary, and there was a decree for specific performance, the title was referred to the chief clerk, who certified in favor of a good title as made out at a time named (which was no doubt after the bill filed), Wood V. C. held, that the costs of an inquiry upon a reference of title are payable by the party who has resisted the decree for performance. It had been said that the title was not completely ready at the time the decree was asked for. Undoubtedly a vendor seeking the aid of the court for enforcing specific performance was bound to come with his title ready. Then the question was as to the simple investigation of title, the vendor being compelled to file his bill. But for this necessity the inquiry would have proceeded in the usual manner, and no expense * of investigation in chambers would have been necessary. That expense, therefore, must be borne by the purchaser, but the vendor was only to be allowed the costs of two attendances before the chief clerk.

25. If a bill is filed by a seller because the purchaser contends, for example, that he has by a notice put an end to the contract, and the contract is held to be still subsisting, the litigation up to the hearing must be considered to be, not whether a good title had been shown, but whether the contract had been abandoned, and therefore the costs will up to that time be cast upon the purchaser. (q)

26. The same point was decided in *Scoones v. Morrell*, where the seller was plaintiff, and the court was of opinion that the suit was not occasioned by the objections which had been removed in the master's office, and therefore ordered the purchaser to pay the costs of the suit. The court observed that it frequently happened that the duty which the vendor had undertaken to perform in making out a good title is interrupted by some claim or demand on the part of the purchaser, which cannot be sustained, and which gives rise to a suit; the consequence may be that something remains to be done until the suit gets into the master's office, but which the vendor would have done without suit if an opportunity had been afforded him. In such a case the fact of the title having been perfected in the master's office does not determine the question of costs, and then it becomes absolutely

(q) *Taylor v. Brown*, 2 Beav. 180; *Croome v. Lediard*, 2 My. & Ke. 293.

necessary to look into the circumstances.^(r) In this case the original objection was to the validity of a will, and the seller to obviate this objection instituted a suit against the heir to establish the will, *subsequently* to filing his bill for a specific performance, and obtained a decree to establish the will before the specific performance suit came to a hearing. Now, although it is quite right to ascertain the origin of the suit, and to deal with the costs accordingly, yet a general rule in such cases to fix the purchaser with all the costs of the suit would bear hardly upon a *bonâ fide* purchaser, for if he were *upon the original objection being removed* to submit to a specific performance, yet he ought, if the objection were a valid one, to have the costs up to that time. The court could not require him to accept the title without further investigation, and it may be necessary in many such cases to proceed to an investigation of it in the office. Unless, therefore, the purchaser has acted improperly, and wantonly driven the seller to file a bill, the nature of the investigation in the office ought to be fully considered, instead of all the costs being thrown upon the purchaser because he originally took a ground which failed. It is no doubt very difficult in such cases to administer *substantial justice between the parties upon the subject of costs; and these observations are intended to have a general application. In the case under consideration, it is stated that the vendor endeavored to obtain a deed of confirmation from the heir of the testator, but the purchaser advised him not to confirm the will.

27. Generally, if a purchaser make a claim to which the court thinks he is not entitled, but which renders it necessary for the seller to file a bill, and a specific performance be decreed, the purchaser may be compelled to pay the costs of the suit; ^(s) and the same rule prevails where the purchaser himself files a bill claiming more than he is entitled to: he may be compelled, against his wish, to take what by construction the agreement included, and to pay the costs of the suit.^(t)

28. Although a purchaser takes a frivolous objection to the

(r) 1 Beav. 251; see *Grove v. Bastard*, 292; *Abbott v. Sworder*, 4 De G. & Sm. 1 De G., M. & G. 69; *Carrodus v. Sharp*, 448.

20 Beav. 56.

(t) *Fife v. Clayton*, 13 Ves. 546; 1 C.

(s) *Wyvill v. Bishop of Exeter*, 1 Price, 353.

title, the vendor is not warranted in considering it unnecessary for him to make out any further title, and that he is at liberty to wait and see how that objection is disposed of; yet where a purchaser raised an unfounded claim for compensation, and the seller gave notice to resell, and the purchaser filed his bill, and was ordered to pay the costs occasioned by his claim, and a reference was made as to title, the purchaser was fixed with the costs of the suit, although the seller had not produced some further evidence of title until after the bill was filed.(u)

29. Where a man buys two lots *not connected together*, and a good title is shown to the one but not to the other, and he refuses to complete the purchase of the one to which there is a good title, and the seller files a bill, the purchaser will have to pay the costs as far as they relate to the latter lot.(v)

30. Lord Thurlow has said, that if a purchaser will not wait until the title is cleared, but will take possession, and put the vendor to all the inconvenience of the discussion, when he is out of possession, and the other has got it, that weighs much as to costs.(x) But the circumstance of taking possession is not important, where, by the terms of the contract, the title is to be made good at a subsequent period, much less is it material where the purchaser is induced to take possession at the instance of the vendor himself.(y) Long possession, although authorized by the contract, without objecting to the title of an abstract of which the purchaser is in possession, will be a ground to compel him to pay the costs of a suit for specific performance; (z) and if, after a long possession, the purchaser having * paid nothing, refuses the title, which is not a good one, and yet will not abandon the contract—using the contract to retain the possession—he will have to pay the costs of a suit by the seller to have the contract cancelled, or the title accepted.(a)

31. If a purchaser's bill for a specific performance be dismissed with costs, although he has paid a deposit to the seller, the defendant, he will not be allowed to set the costs off against it, but will be left to his remedy at law to recover his deposit.(b)

(u) *Lyle v. Lord Yarborough*, John. 70.

(v) *Lewin v. Guest*, 1 Russ. 325.

(x) 11 Ves. 464; *Calcraft v. Roebuck*, 1 Ves. jr. 222.

(y) 11 Ves. 464.

(z) *Fleetwood v. Green*, 15 Ves. 594; *Margravine of Anspach v. Noel*, 1 Mad.

310.

(a) *King v. King*, 1 My. & Ke. 442.

(b) *Williams v. Edwards*, 2 Sim. 78.

32. It may be that neither the seller nor the purchaser is to blame, but the suit is rendered necessary by the wilful refusal of a trustee to convey, and in such a case, but it must be a strong one, and clearly made out, the trustee will be compelled to pay all the costs of the suit.(c)

33. Where a purchaser brings an action for his deposit, and upon a bill filed the court decides against him, although a decree is made without costs, yet he will have to pay the costs at law.(d) The same rule is applied to the vendor when he brings an action, and the purchaser succeeds in a suit. It may be considered a general rule, that either party resorting to law where the equity is against him, will be fixed with the costs of the action. But a purchaser will be refused his costs at law, if they were chiefly incurred by his own negligence in not filing his bill sooner.(e)

34. If the purchaser's bill is dismissed upon the discretion of the court, because the purchaser's conduct in the transaction has not been honorable, it will visit him with the payment of the costs.(f)

35. So if there was an objection in the seller's way, for example, a right of sporting over the estate, not disclosed in the contract, but the purchaser waived it, he would be saddled with the costs if he resisted a specific performance upon the objection so waived.(g)

36. And if he obtain a bargain at an inadequate price, but which the court may be bound to enforce, it will not give him costs (h) against the seller whose estate he has obtained at an undervalue.

37. Although a seller's bill for want of a sufficient title is dismissed with costs, yet if the purchaser, as a defence, has set up fraud and misrepresentation, which are disproved, the purchaser will have to pay the costs occasioned by that defence.(i)

38. And if a purchaser file a cross bill to have the contract delivered up, and he obtain a decree, yet it will be without costs, if he pray that it may be declared that the contract was obtained by fraud and misrepresentation, which are disproved.(k)

(c) *Jones v. Lewis*, 1 Cox, 199.

(d) *Staines v. Morris*, 1 Ves. & Bea. 8.

(e) *Grover v. Hugell*, 3 Russ. 428.

(f) *Davis v. Symonds*, 1 Cox, 402.

(g) *Burnell v. Brown*, 1 J. & W. 175.

(h) *Burrowes v. Lock*, 10 Ves. 470.

(i) *Wright v. Howard*, 1 Sim. & Stu. 190.

(k) S. C.

* 39. If either party file a bill contrary to the case provided for by the contract, he will have to pay the costs of it; thus, where the contract stipulated that if the purchaser's counsel was of opinion against the title, the sale should be void, and he was of opinion that a title could be made only to some shares of the estate, the purchaser's bill for a specific performance with an abatement was dismissed with costs.(*l*)

40. If a suit be necessary to confer a good title, the costs of it must be borne by the seller.(*m*) But where a suit was rendered necessary in consequence of the vendor's death, who had devised the estate to an infant, that was not deemed sufficient to make the vendor's estate liable to the costs of the suit; but there being no default in either party, each party had to pay his own costs.(*n*) So where one of several vendors after the contract became of unsound mind, although not found lunatic by inquisition, upon a bill filed by some of the vendors for a specific performance, no costs were given on either side.(*o*)

41. If a misstatement be made upon a purchase which makes it necessary for a purchaser to file a bill, even after he has obtained his conveyance and paid his money, although the misstatement was a mere mistake and not intentional, the purchaser, if he obtain relief, will be entitled to the costs of the suit against the seller.(*p*) And even where the alleged misrepresentation and fraud by the seller was not made out to the satisfaction of the court, yet as the description of the property was not accurate, although the purchaser's bill for relief was dismissed, it was without costs, as a good lesson to those who undertake to give a description of what they sell, and are therefore bound to be accurate.(*q*)

42. If a conveyance be made to a purchaser, and yet the title cannot be cleared up on account of incumbrances which the seller cannot pay off, the latter must pay all the costs of the suit and of the reconveyance from the purchaser.(*r*)

43. If, after a bill filed for a specific performance, the plaintiff

(*l*) *Williams v. Edwards*, 2 Sim. 78.

(*o*) *Cresswell v. Haines*, 31 L. J. N. S.

(*m*) *Farrer v. Ld. Winterton*, 4 Yo. & 237.

Col. 472, see ch. 2, *supra*; *Hawkins v.*

(*p*) *Harrison v. Coppard*, 2 Cox, 318.

Perry, 25 L. J. N. S. 656.

(*q*) *Bartlett v. Salmon*, 6 De G., M. &

(*n*) *Bannerman v. Clarke*, 3 Drew. 632. G. 42.

(*r*) *Sloper v. Fish*, 2 Ves. & Bea. 145.

in pursuance of a power in the instrument, determines the contract, the bill will be dismissed without costs.(s)

44. We have elsewhere seen in what instances costs are given upon a sale by order of the court itself.(t) The same rules have been extended in Ireland to a sale by assignees of bankrupts.(u)

* 45. If a decree made with costs is reversed in the House of Lords, and the plaintiff's bill is dismissed with costs, that will only extend to the costs of the suit up to the time of the decree in the court below, and including the settling of the decree, however numerous may have been the subsequent proceedings, for they are considered proceedings arising out of the error of the judge; (x) and no interest can be given on the costs.

46. A purchaser whose money has been paid into court may before completion of the purchase, upon being served with a petition or a notice of motion for payment of it out, appear, and will be entitled to the costs although he has no objection to offer; (y) but where he has obtained his conveyance, and is served with a petition, for distribution of the money, he should not appear, but should inform the petitioners that he has no claim. If he appear he would not obtain any costs.(z)

(s) *Western v. Perrin*, 3 Ves. & Bea. 197, agreement for a lease.

(t) Chap. 3.

(u) *In re Page*, 1 Dru. & Wal. 36.

(x) *Small v. Attwood*, 3 Yo. & Col. 501.

(y) *Bamford v. Watts*, 2 Beav. 201.

(z) *Barton v. Latour*, 18 Beav. 526.]

CHAPTER XVIII.

OF THE OBLIGATION OF A PURCHASER TO SEE TO THE APPLICATION OF THE PURCHASE MONEY.

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| <p><i>I.</i> Purchase from heir or devisee.</p> <p><i>II.</i> Purchaser's liability before 22d & 23d Vict. c. 35, s. 23, making trustees' receipts discharges — 1. As to real estate.</p> <p><i>III.</i> — 1. Where debts and legacies are not intended to be paid: Charge of debts exonerates purchaser in all cases, <i>semb.</i>: Fraudulent sale:</p> <p>2. Trust to raise deficiency of personal estate, purchaser not liable. — <i>Contra</i> of a power; how such a power should be given:</p> <p>3. Implied power to vary securities. — Dealings by trustees with the estate before sale:</p> <p>4. Payment to one of several trustees bad:</p> <p>5. Effect of contract on trust for sale, &c.:</p> | <p>6. What trustees should give receipt. — Disclaimer:</p> <p>7. Distinction between receipt under power of attorney and under receipt clause:</p> <p>8. Mortgage to two: receipt of survivor:</p> <p>9. New trustee appointed by court:</p> <p>10. Payment of money to solicitor or agent:</p> <p>11. Payment upon solicitor's undertaking:</p> <p style="text-align: center;"><i>IV. As to Leaseholds.</i></p> <p>1. Purchaser of leasehold not bound to see debts paid. Executor cannot sell for his own debts:</p> <p>2. Sale at undervalue. — Fraud:</p> <p>3. Laches by legatee:</p> <p>4. Sale by executor of leasehold specifically bequeathed.</p> |
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I. **ALTHOUGH** an heir at law is bound by specialty debts in respect of lands descended, yet a purchaser of those lands, without notice of * any debts, was never holden to be subject to them. The statute of fraudulent devises was always considered as placing a devisee on exactly the same footing as an heir at law; and the debts of the testator will not bind a purchaser from the devisee, if he bought *bonâ fide* and without notice.(a) Equity will, however, in behalf of creditors, grant an injunction against a purchaser to restrain payment to the heir.(b) In *Woodgate v. Woodgate*,(c) Lord Eldon was of opinion, that simple contract creditors, under 47 Geo. 3, c. 74,(d) stand in the above respect in the same situation as specialty creditors under the statute of fraudulent devises. And in *Spackman v. Tim-*

(a) See *Matthews v. Jones*, 2 Anst. 506. (c) MS.

(b) *Green v. Lowes*, 3 Bro. C. C. 217. (d) Repealed and reenacted by the 1

brell,(e) it was decided that the common law and the statutes 3 & 4 Will. & Mary, c. 14, and 47 Geo. 3, c. 74, do not charge the real assets descended or devised with the debts of the ancestor, but make the heir or devisee liable personally to answer the value of the assets, and therefore a purchaser from a devisee of a trader is liable to see to the application of the purchase money where legacies only are charged on the estate by the will; (f) and the same principle applies to the 3 & 4 Will. 4, c. 104, which made freehold and copyhold estates of persons who should die after the 29th of August, 1833, *assets to be administered in equity* for the payment of simple contract as well as specialty debts.(g) That act leaves the distinction between estates subjected to the payment of debts by the will of the debtor, and estates subject to debts by the operation of law, precisely as it was before.(h) The act extends to lands appointed by will under a general power.(i)(1) The operation of the statutes is fully considered in *Kinderley v. Jervis*,(k) where it was held that the * heir takes a beneficial interest in the descended assets of the ancestor only to the extent that the same are not required for the payment of the debts of the ancestor in a due course of administration, and therefore the judgment debts of the heir cannot rank as against the simple contract debts of the intestate. But it has been held

(e) 8 Sim. 253; *Richardson v. Horton*, 7 Beav. 112; *Pimm v. Insall*, 7 Hare, 193; 1 M. & G. 449; *Dunne v. Doran*, 13 Ir. E. R. 545; but see *Hynes v. Redington*, 10 Ir. Ch. Rep. 206.

(f) *Horn v. Horn*, 2 Sim. & Stu. 448.

(g) *Mirehouse v. Scaife*, 2 My. & Cra. 708; corrected 4 My. & Cra. 269; *In re St. George's Packet Co.* 2 De G., M. & G. 366, for extent of charge; *Dring v. Greetham*, as to statute of limitations, 1 Eq. R. 442. The language in *Ex parte*

Hamer's Devises, 2 De G., M. & G. 366, is rightly construed in 2 Jur. N. S. pt. 1, 313; *Kinderley v. Jervis*, *Id.* 602.

(h) *Ball v. Harris*, 4 My. & Cra. 268, 269; 2 My. & Cra. 708; *Rickard v. Barrett*, 3 Kay & J. 289; as to tacking simple contract debts, *Rolfe v. Chester*, 20 Beav. 610.

(i) *Fleming v. Buchanan*, 1 Eq. R. 186.

(k) 22 Beav. 1; *De Sorbein v. Bland*, 2 De G. & J. 158; see *Hynes v. Redington*, 10 Ir. Ch. Rep. 206.

(1) The authorities differ upon the question whether since the 1st Vict. c. 26, residuary real estate is or is not liable to the debts after the residuary personal estate in case of specific legatees and devisees; *Eddels v. Johnson*, 1 Giff. 22, decided that it is not, and *Dady v. Hartridge*, 32 L. T. 7, that it is; and that has been followed in *Rotherham v. Rotherham*, 26 Beav. 465. The point is, whether the statute has operated on residuary devises so as to render them no longer specific. In *Pearmain v. Twiss*, 2 Giff. 130, *Stuart V. C.* held that every devise of real estate was still specific, and disagreed with *Dady v. Hartridge* and *Rotherham v. Rotherham*.

that since the statute a mortgagee of freeholds may tack his simple contract debt as against the heir.^(l) A committee of a lunatic stands after the lunatic's death on the same footing with the general simple contract creditors, and a purchaser may safely buy, although he have notice of the debt without seeing that it is paid.^(m)

II. Formerly very nice distinctions were taken, where the usual clause making trustees' receipts discharges was omitted,⁽¹⁾ in regard to the liability of a purchaser to see to the application of the purchase money. These were swept away by a statute,⁽ⁿ⁾ which provided that the *bonâ fide* payment to, and the receipt of any person to whom any money should be payable upon any express or implied trust, or for any limited purpose, or of the survivors or survivor of two or more mortgagees or holders, or the executors or administrators of such survivors, or their or his assigns, should effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary should be expressly declared by the instrument creating the trust or security. This act took effect from the 31st December, 1844, and was not to extend to any deed, act, or thing, executed or done, or to any estate, right, or interest, created before the 1st of January, 1845. But by an act of the next session ^(o) the former act was in this respect repealed, as from the 1st of October, 1845, so that the power to trustees to give receipts under the act extended only from the 1st of January to the 1st of October, 1845. By an act which received the royal assent on the 13th August, 1859, it was once more enacted that the *bonâ fide* payment to and the receipt of any person to whom any purchase or mortgage money shall be payable upon any express or implied trust shall effectually discharge the person paying the same from seeing to the appli-

(l) *Thomas v. Thomas*, 22 Beav. 341. (o) 8 & 9 Vict. c. 106, s. 1; see 11 Ir.

(m) *Jones v. Noyes*, 28 L. J. N. S. 47. Eq. Rep. 32.

(n) 7 & 8 Vict. c. 76, s. 10.

(1) By the 15 & 16 Vict. c. 86, s. 47, any person claiming to be a creditor of a deceased person, or interested under his will, may apply in a summary way for an order for the administration of the real estate of a deceased person, where the whole of such real estate is by devise vested in trustees who are by the will empowered to sell such real estate, and authorized to give receipts for the rents and for the produce of sale, and see sect. 42, stated *infra* in note, and see sect. 55.

cation, or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument * creating the trust or security.(p) In practice it will be necessary to pay attention to the dates above mentioned. And it is still necessary with reference to past transactions to know what the former rules of equity were. These rules as to real estate were as follows: If the trust was of such a nature that the purchaser might reasonably be expected to see to the application of the purchase money, as if it were for the payment of legacies,(p¹) or of debts which were scheduled or specified, he was bound to see that the money was applied accordingly;(q) and that, although the estate were sold under a decree of a court of equity,(r) or by virtue of an act of parliament.(s) If, however, more of an estate were sold than was sufficient for the purposes of the trust, that would not turn to the prejudice of the purchaser; for the trustees could not sell just sufficient to pay the debts, &c. Besides, in most cases, money was to be raised to pay the trustees' expenses.(t) And this is still the rule. Where the trust was for payment of debts generally, a purchaser was not bound

(p) 22 & 23 Vict. c. 35, s. 23; and see s. 12 and 29 of 23 & 24 Vict. c. 145, providing for the sufficiency of receipts for money by the persons executing the powers and trusts conditionally conferred by that act.

(p¹) [*Cadbury v. Duval*, 10 Barr, 265; *Gardner v. Gardner*, 3 Mason, 178; *St. Mary's Church v. Stockton*, 4 Halst. Ch. 520; *Duffy v. Calvert*, 6 Gill, 487. See *Andrews v. Sparhawk*, 13 Pick. 401; *Grant v. Hook*, 13 Serg. & R. 259, 262; *Hannum v. Spear*, 1 Yates, 553; S. C. 2 Dallas, 291; *Cryder's Appeal*, 11 Penn. St. 72.]

(q) *Culpepper v. Aston*, 2 Ch. C. 221; *Show*, 313; *Spalding v. Shalmer*, 1 Ver. 301; *Dunch v. Kent*, 1 Ver. 260; *Anon. Mos.* 96; *Abbott v. Gibbs*, 1 Eq. Ca. Ab. 358, pl. 2; *Elliot v. Merryman*, Barn. R. C. 81; *Smith v. Guyon*, 1 Bro. C. C. 186, and cases in the note, 1 Ves. 215. [See *Gardner v. Gardner*, 3 Mason, 178, 218; *Andrews v. Sparhawk*, 13 Pick. 401; 2 Story Eq. Jur. § 1132; 1 Lead. Cas. Eq.

(3d Am. ed.) 123 *et seq.*, notes to *Elliott v. Merryman*; *Mather v. Norton*, 21 L. J. Ch. 15; *Leavitt v. Worcester*, 14 N. H. 550; *Swasey v. Little*, 7 Pick. 296; *Kemp v. McPherson*, 7 Harr. & J. 320; *Hoover v. Hoover*, 5 Barr, 351; *Long v. Long*, 1 Watts, 267; *Duffy v. Calvert*, 6 Gill, 487; *Dalzell v. Crawford*, 1 Pars. Eq. 57; *Bugbee v. Sargent*, 23 Maine, 269; *Dowman v. Rust*, 6 Rand. 587; *Lupton v. Lupton*, 2 John. Ch. 614.]

(r) *Lloyd v. Baldwin*, 1 Ves. 173; *Binks v. Ld. Rokeby*, 2 Mad. 227. [But it is said to be well settled that a purchaser under a decree of a court has no concern with the disposition which the court may make of the purchase money, nor can his right as a purchaser be affected by any misapplication that may be made of it. *Coombs v. Jordan*, 3 Bland, 284, 329; *Wilson v. Davisson*, 2 Rob. (Va.) 385, 412; *Brown v. Wallace*, 4 Gill & J. 479.]

(s) *Cotterell v. Hampson*, 2 Ver. 5.

(t) *Spalding v. Shalmer*, 1 Ver. 301.

to see to the application of the purchase money, although he had notice of the debts; (u) and if the charge was general, the mention of a particular debt did not vary the case. (x) And if an executor who could have sold the estate which was charged generally with debts and legacies, conveyed to the beneficial devisee, reciting that he had paid all the debts and legacies, a purchaser from the devisee would have been safe, although the debts or legacies were not paid. (y) Nor was a purchaser bound to see the money applied, where the trust was for payment of debts generally, and also for payment of legacies. (z) (1) And, of course, he was not bound to see that only so much of the estate was sold as was necessary for the * purposes of the trust. Nor

(u) Cases cited above; *Humble v. Bill*, 1 Eq. Ca. Ab. 358, pl. 4; *Ex parte Turner*, 9 Mod. 418; *Hardwicke v. Mynd*, 1 Anst. 109; *Williamson v. Curtis*, 3 Bro. C. C. 96; *Barker v. Duke of Devon*, 3 Mer. 310; *Langmead's trusts*, 7 De G., M. & G. 353; [*Lewin Trusts* (5th Eng. ed.)], 336; *Garnett v. Macon*, 6 Call, 308; 2 Brock. 185, 186; *Dalzell v. Crawford*, 1 Pars. Eq. 57; *Bruch v. Lantz*, 2 Rawle, 392; *Gardner v. Gardner*, 3 Mason, 178; *Potter v. Gardner*, 12 Wheat. 198; *Williams v. Otey*, 8 Humph. 568; *Hauser v. Shore*, 5 Ired. Eq. 357; *Laurens v. Lucas*, 6 Rich. Eq. 217; *Goodrich v. Proctor*, 1 Gray, 570.]

(x) *Robinson v. Lowater*, 17 Beav. 592; 5 De G., M. & G. *inf.*; *Cook v. Dawson*, 29 Beav. 123.

(y) *Storry v. Walsh*, 18 Beav. 559.

(z) *Jebb v. Abbott*, *Benyon v. Collins*, *Butler's n. Co. Litt.* 290 b, s. 12; *Rogers v. Skillicorne*, Amb. 188; *Walker v. Flamstead*, 2 Ld. Keny. 2d part, 57; *Omerod v. Hardman*, 5 Ves. 722, which *qu.*; *Dowling v. Hudson*, 17 Beav. 248. [See 2 Story Eq. Jur. §§ 1130 *et seq.*; *Andrews v. Sparhawk*, 13 Pick. 393; *Gardner v. Gardner*, 3 Mason, 178; *Wormley*

v. Wormley, 8 Wheat. 421, 442, 443; *Lining v. Peyton*, 2 Desaus. 378, in note; *Colyer v. Finch*, 5 H. L. Cas. 923; *Robinson v. Lowater*, 5 De G., M. & G. 272; S. C. 17 Beav. 592; *Potter v. Gardner*, 12 Wheat. 498; *Laurens v. Lucas*, 6 Rich. Eq. 217; *Williams v. Otey*, 8 Humph. 568; *Hauser v. Shore*, 5 Ired. Eq. 357; *McNeillie v. Acton*, 4 De G., M. & G. 744; *Farhall v. Farhall*, L. R. 7 Eq. 286; *Storry v. Walsh*, 18 Beav. 559; *Lewin Trusts* (5th Eng. ed.), 336, and cases in note (a); *Grant v. Hook*, 13 Serg. & R. 259; *Cadbury v. Duval*, 10 Barr, 265; *Sims v. Lively*, 14 B. Mon. 435. In *Andrews v. Sparhawk*, 13 Pick. 393, 401, *Wilde J.* said: "It has been urged that legacies are on a footing with scheduled debts, since the will shows their amount and to whom they are payable. But debts are to be first paid, and until they are paid the application of the purchase money cannot be made to the payment of the legacies; they cannot therefore stand on a better footing than debts not scheduled." See *Grant v. Hook*, 13 Serg. & R. 259, 262; *Bruch v. Lantz*, 2 Rawle, 392, 417; *Sims v. Lively*, 14 B. Mon. 435; *Cadbury v. Duval*, 10 Barr, 265.]

(1) And where the whole money has been raised, the heir or devisee will be entitled to the estates unsold, and the creditors or legatees will have no remedy against the same; because the estate is debtor for the debts and legacies, but not for the faults of the trustees. Anon. in D. P. 1 Salk. 153.

was he bound to see to the application of the money, where there had been a decree; for the court takes upon itself the application of the money. (a) (1) Where the *time of sale had arrived*, and the persons entitled to the money were infants or unborn, the purchaser was not bound to see to the application of the money. (b) But if an estate was charged with a sum of money for an infant payable at his majority, and there was no direction to appropriate the money, a purchaser could not safely complete his purchase, although the money was invested in the funds as a security for the payment of the legacy to the infant, when he should become entitled; for if, in the event, the fund should turn out deficient for payment of the infant's legacy, he might still have recourse to the estate for the deficiency. And it would seem that even a court of equity could not, in a case of this nature, bind the right of an infant. (c) This must still be kept in view, unless the trustees have expressly or by implication an immediate authority to sell. (d) Although the trusts were defined, yet payment to the trustees was sufficient, wherever the money was not merely to be paid over to third persons, but was to be applied upon trusts which required time and discretion, as where the trust was to lay

(a) *Todd v. Studholme*, 3 Kay & J. 324; but as to the rule formerly, see *Lloyd v. Baldwin*, 1 Ves. 173. [See *Lining v. Peyton*, 2 Desaus. 375.]

(b) *Sowarsby v. Lacy*, 4 Mad. 142; *Lavender v. Stanton*, 6 Mad. 46; *Breedon v. Breedon*, 1 Rus. & My. 413; *Keon v. Magawley*, 1 Dru. & War. 401.

(c) *Dickenson v. Dickenson*, 3 Bro. C. C. 19, *et qu.*; *Mills v. Osborne*, 7 Sim. 36; where all portions may be raised, *Gillibrand v. Goold*, 5 Sim. 149; *Leech v. Leech*, 2 Dru. & War. 568; *Sheppard v. Wilson*, 4 Hare, 392, *contra*.

(d) See 22 & 23 Vict. c. 35, s. 14 to 18; *inf.*

(1) The 15 & 16 Vict. c. 86, s. 42, prohibits the taking an objection for want of parties where the suit concerns real or personal estate vested in trustees, and declares that such trustees represent the persons beneficially interested under the trust to the same extent as executors in suits represent the personal estate, but the court may at the hearing order any of the persons beneficially interested to be made parties; see, also, s. 47, stated *supra* in n. It has been held that with a view to a proper sale, and to prevent the title of a purchaser from being open to impeachment (although, if the court did proceed in the absence of parties, it would protect the purchaser), the parties beneficially entitled should, as a general rule, be made parties to the suit for a sale, which now may be done at a small expense, *Doody v. Higgins*, 9 Hare App. 32; see *Goldsmid v. Stonehewer*, *Ib.* 38; *Hanman v. Riley*, *Ib.* 40; *Densem v. Elworthy*, *Ib.* 42; *Fowler v. Bayldon*, *Ib.* 78; *Bolton v. Stannard*, 4 Jur. N. S. 576. Where a mortgagee has joined in the conveyance, and the money has been paid out of court without satisfying his demand, his right to recover is shown by *Todd v. Studholme*, 3 Kay & J. 324.

out the money in the purchase of estates.(e) And where the trust was to pay the money amongst creditors, who should come in within eighteen months, the estate was sold after that time had elapsed, and it was held that the receipt of the trustees was a good discharge.(f) So where the trust * was to lay out the money in the funds, &c., upon trusts, if the purchaser saw it invested according to the trust, and procured the trustees to execute a declaration of trust, he was discharged from the obligation of seeing to the further application of the money.(g) The same rules appeared to apply, whether the estate were devised or conveyed to trustees to sell for payment of debts, &c., or was only *charged* with the debts.(h) And where an estate was given to a devisee, he paying the debts, so that the words were sufficient to pass the fee, a purchaser from the devisee would not be affected by any gift over of the estate, for the devisee had a right to sell to pay the debts, and if the price of the estate was more than would satisfy the debts, the remedy of the devisees over was against the first devisee, and not against the purchaser.(i) In a case where in a will, by reference to a devise in the will of another person, powers of sale and exchange were given to the

(e) *Doran v. Wiltshire*, 3 Swan. 699; *Glyn v. Locke*, 3 Dru. & War. 11; *Ford v. Ryan*, 4 Ir. Ch. R. 343, where a policy of assurance was assigned. [*Coombs v. Jordan*, 3 Bland. 284, 329; *Wilson v. Davisson*, 2 Rob. (Va.) 385, 412; *Brown v. Wallace*, 4 Gill & J. 479; *Grant v. Hook*, 13 Serg. & R. 259; *Cryder's Appeal*, 11 Penn. St. 72.]

(f) *Balfour v. Welland*, 16 Ves. 151; see *Groom v. Booth*, 1 Drew. 548.

(g) 2 Cas. & Op. 114. [See *Lining v. Peyton*, 2 Desaus. 375.]

(h) *Anon. Mos.* 96; *Newell v. Ward*, Nels. C. R. 38; *Elliot v. Merryman*, Barn. R. C. 78; 2 Atk. 41; *Amb.* 189, marg.; *Walker v. Smallwood*, *Amb.* 677; 6 Ves. 654, n.; see *Bailey v. Ekins*, 7 Ves. 323; *Shaw v. Borrer*, 1 Kee. 559; *Ball v. Harris*, 8 Sim. 485, 4 My. & Cra. 264. [In *Andrews v. Sparhawk*, 13 Pick. 393, 401, Mr. Justice Wilde said: "It has been argued that there is a distinction between

a devise of an estate in trust to be sold, and an estate charged in a trustee's hands for the payment of debts and legacies. We think there is no good ground for this distinction, either in principle or upon authority. In both cases the purchaser would be subjected to the same difficulty and hazard, if he were required to see to the application of the purchase money." And in *Gardner v. Gardner*, 3 Mason, 178, 219, 220, Mr. Justice Story said: "Looking to the principle upon which the general doctrine is founded, I am not able to perceive any material difference between a direct trust to pay debts, and a charge upon the lands for the same purpose." "I cannot but think that the current of authority and the analogy of the law ought to lead us to a rejection of any such distinction, as unsatisfactory in principle and inconvenient in practice." See 2 Story Eq. Jur. § 1131.]

(i) *Dolton v. Hewen*, 6 Mad. 9.

tenants for life, it was held that the power in the will referred to, to give receipts for the purchase money, was not by implication given to the tenants for life in the principal will, but the court thought that the difficulty might be removed by paying the money into court under the trustee relief act, 10 & 11 Vict. c. 96.(*k*) Where an estate was devised or conveyed to trustees to sell for payment of debts generally without a clause that their receipts should be charges, and they conveyed to a third person *for the purposes of the trust*, sales made by him with his receipts were said to be effectual.(*l*) An assignment of a policy by way of mortgage, with a power to receive the money, was, of course, deemed sufficient to absolve the party paying to the assignee.(*m*) Where lands were charged with the payment of annuities, those lands would be liable in the hands of a purchaser, because it was the very purpose of making the lands a fund for that payment, that it should be a constant and subsisting fund.(*n*) But it was otherwise where there was also a charge of debts.(*o*) And this is still the rule, unless the trustees are expressly or by implication authorized to sell. So where an estate was devised, subject to existing charges, the purchaser must, of course, have seen, as he still must, the charges duly paid. A purchaser buying subject to a pecuniary charge will not be allowed to pay the money into court under the trustee relief act.(*p*)

(*k*) *Cox v. Cox*, 1 Kay & J. 251.

(*l*) *Hardwick v. Mynd*, 1 Aust. 109; *Braybrooke v. Inskip*, 8 Ves. 417.

(*m*) *Desborough v. Harris*, 1 Jur. N. S. 986.

(*n*) *Elliot v. Merriman*, Barn. R. C. 82; *Wynn v. Williams*, 5 Ves. 130.

(*o*) *Page v. Adams*, 4 Beav. 269.

(*p*) *In re Buckley's trust*, 17 Beav. 110.

[In stating the principle of requiring a purchaser to see to the application of his purchase money, Mr. Lewin, in his work on Trusts (5th Eng. ed. p. 332), says: "As a general rule, if a person have in his hands money or other property to which another person is entitled, he cannot discharge himself from liability but by payment or transfer to the true owner. If an estate be vested in A. upon trust to sell and divide the proceeds between B. and C.,

in a court of law the absolute ownership is in A., and his receipt, therefore, will discharge the purchaser; but in equity, B. and C., the *cestuis que trust*, are the rightful proprietors, and A. is merely the instrument for the execution of the settlor's purpose, and the receipt, therefore, to be effectual, must be signed by B. and C. (see *Weatherby v. St. Giorgio*, 2 Hare, 624); and the power of the vendor (the trustee) to sign a discharge for the purchase money is a question not of *conveyance* but of *title*. (*Forbes v. Peacock*, 12 Sim. 521.) Such is the *prima facie* rule in trusts; but in every instance it is liable to be controlled and defeated by an intention to the contrary collected from the instrument creating the trust, whether that intention be expressed or implied. The former is the case if the settlor direct in

* III. 1. But if the sale or mortgage, from the circumstances of the transaction, afforded evidence that the purchase money

express terms that the receipts of A., the trustee, shall discharge the purchaser from seeing to the application of the purchase money; for B. and C. cannot at the same moment claim under and contradict the instrument—they cannot avail themselves of the sale, and reject the proviso affecting the receipt.” “In what cases the power of signing receipts is implied, has never been satisfactorily ascertained. However, two principles appear to be the basis upon which most of the distinctions taken by the courts have been founded. *First*. In the creation of a trust for immediate sale, it is clearly implied, that a legal and equitable discharge for the purchase money shall be signed by some one at the time of the sale. There can be no conveyance of the estate without payment of the money, and there can be no such payment without a complete discharge. Should the settlor have contemplated a sale at a time when, as he must have known, the *cestuis que trust*, or some of them, were either not in existence, or not of a capacity to execute legal acts, the intention must be presumed that the receipts of the trustees should be a release to the purchaser. *Secondly*. If a sale be directed, and the proceeds are not simply to be paid over to certain parties, but there is a *special* trust annexed, the inference is that the settlor meant to confide the execution of the trust to the hands of the trustee and not of the purchaser, and that the trustee therefore can sign a receipt. *Doran v. Wiltshire*, 3 Swan. 699; *Balfour v. Welland*, 16 Ves. 157; *Wood v. Harman*, 5 Mad. 368; *Locke v. Lomas*, 5 De G. & S. 326; see *Glynn v. Locke*, 3 Dru. & War. 11; *Ford v. Ryan*, 4 Ir. Ch. Rep. 342; *Cox v. Cox*, 1 Kay & J. 251; *Booth's Cas. & Op.* 114. To the principle under consideration is referable the well known rule, that a purchaser is not bound to see to the application of his money where the trust is for payment of debts generally; for to ascertain who were the creditors, and

what is the amount of their respective claims, is matter of trust involving long and intricate accounts, and requiring the production of vouchers, which the purchaser would have no right to require. *Forbes v. Peacock*, 11 Sim. 152; and see *S. C.* 12 Sim. 528; 1 Phill. 717; *Stronghill v. Anstey*, 1 De G., M. & G. 635; *Dowling v. Hudson*, 17 Beav. 248; *Culpepper v. Aston*, 2 Ch. Ca. 223; *Watkins v. Cheek*, 2 S. & S. 205, per Sir J. Leach; *Anon. Mosely*, 96; *Hardwick v. Mynd*, 1 Aust. 109; *Johnson v. Kennett*, 3 M. & K. 630, per Lord Lyndhurst; *Rogers v. Skillicorne, Amb.* 189, per Lord Hardwicke; *Walker v. Smallwood, Amb.* 677, per Lord Camden; *Barker v. Duke of Devonshire*, 3 Mer. 310; *Abbott v. Gibbs*, 1 Eq. Cas. Ab. 358; *Binks v. Rokeby*, 2 Mad. 238, per Sir T. Plumer; *Dunch v. Kent*, 1 Vern. 260; *Elliot v. Merriman, Barn.* 78; *Smith v. Guyon*, 1 Bro. C. C. 1864, and cases cited in note; *Ithell v. Beane*, 1 Ves. sen. 215, per Lord Hardwicke; *Lloyd v. Baldwin*, 1 Ves. sen. 173, *per eundem*; *Dolton v. Hewen*, 6 Mad. 9; *Ex parte Turner*, 9 Mod. 418, per Lord Hardwicke; *Goslin v. Carter*, 1 Coll. 644; *Eland v. Eland*, 1 Beav. 235; *S. C.* 4 M. & Cr. 420; *Jones v. Price*, 11 Sim. 557; *Currer v. Walkley*, 2 Dick. 649. So if the trust be for the payment of a particular debt named, and of the testator's other debts. *Robinson v. Lowater*, 17 Beav. 592; 5 De G., M. & G. 272. So if the trust be for the payment of debts and legacies, the purchaser is equally protected; for as the discharge of the debts must precede that of the legacies, and the purchaser is not called upon to mix himself up with the settlement of the debts, he is necessarily absolved from all liabilities in respect of the legacies. *Rogers v. Skillicorne, Amb.* 188; *Smith v. Guyon*, 1 Bro. C. C. 186; *Jebb v. Abbott*, and *Beynon v. Gollins*, cited *Co. Litt.* 290 b, note by Butler; *Williamson v. Curtis*, 3 Bro. C. C.

was not to be applied for the debts or legacies, the purchaser or mortgagee would have been liable to the charge.^(q) But that would not be inferred on light grounds. It was settled that the rule applied to the state of things at the time of the execution of the deed, or at the time of the testator's death, in the case of a will, and therefore if there were debts then, although they had been paid off and the legacies only remained due, and upon a sale the deeds did not, on the face of them, show that the trustees were committing a breach of trust in selling, the purchaser would be safe; ^(r) and even if there were no debts, at the testator's death,^(s) yet a purchaser could not have satisfactory evidence of the alleged fact,^(t) and consequently, it was thought, would not be liable to see to the application of the purchase money, even if the case did not fall within the general rule; and it was laid down generally, that if a trust were created for the payment of debts and legacies, the purchaser or mortgagee

96; *Johnson v. Kennett*, 3 M. & K. 630, per Lord Lyndhurst; 6 Ves. 654, note (a); *Watkins v. Cheek*, 2 S. & S. 205, per Sir J. Leach; *Eland v. Eland*, 1 Beav. 235; S. C. 4 M. & C. 420; *Page v. Adams*, 4 Beav. 269; *Forbes v. Peacock*, 12 Sim. 528; 1 Phill. 717; *Andrews v. Sparhawk*, 13 Pick. 401, *ante*, 658 note (z). But if the trust be for payment of particular or scheduled debts only, *Doran v. Wiltshire*, 3 Swan. 701, per Lord Thurlow; *Smith v. Guyon*, 1 Bro. C. C. 186, *per eundem*, and cases cited in note; *Rogers v. Skillicorne, Amb.* 189, per Lord Hardwicke; *Humble v. Bill*, 1 Eq. Ca. Ab. 359, per Sir N. Wright; *Anon. Mose.* 96; *Spalding v. Shalmer*, 1 Vern. 303, per Lord North; *Abbot v. Gibbs*, 1 Eq. Ca. Ab. 358; *Elliot v. Merryman*, Barn. 81, per Sir J. Jekell; *Binks v. Rokeby*, 2 Mad. 238, per Sir T. Plumer; *Ithell v. Beane*, 1 Ves. sen. 215, per Lord Hardwicke; *Lloyd v. Baldwin*, 1 Ves. sen. 173, *per eundem*; and see *Dunch v. Kent*, 1 Vern. 260; *Culpepper v. Aston*, 2 Ch. Ca. 223, or of legacies only, *Johnson v. Kennett*, 3 M. & K. 930; *Horn v. Horn*, 2 S. & S. 448, then, as there is no trust to be executed requiring time or discretion, but the purchase money is simply to be

distributed amongst certain parties, there is no reason why the purchaser should not, under the general rule, be expected to see that the purchase money finds its way into the proper channel.”]

(q) *Watkins v. Cheek*, 2 Sim. & Stu. 199; *Rogers v. Rogers*, 6 Sim. 364; 4 My. & Cra. 426; *Page v. Adams*, 4 Beav. 269; *Carter v. Sanders*, 2 Drew. 248; where the sale has been long delayed, see *Stronghill v. Anstey*, 1 De G., M. & G. 654. [*Lewin Trusts* (5th Eng. ed.), 337; *Sabin v. Heape*, 27 Beav. 553; see *Williams v. Morton*, 2 Md. Ch. 94; *Clyde v. Simpson*, 4 Ohio St. 445; *Garnett v. Macon*, 6 Call, 302; 2 Brock. 185; *Sacia v. Berthoud*, 17 Barb. 15; *Miller v. Williamson*, 5 Md. 219; *Williams v. Morton*, 2 Md. Ch. 94; *Garrard v. Pittsburg, &c. Railroad Co.* 29 Penn. St. 154; *Pittsburg, &c. Railroad Co. v. Barker*, 29 Penn. St. 160.]

(r) *Johnson v. Kennett*, a very strong case, 6 Sim. 384, reversed, 3 My. & Ke. 624; *Forbes v. Peacock*, 12 Sim. 528, reversed, 1 Phil. 717; *Braithwaite v. Britain*, 1 Ke. 206; *Eland v. Eland*, 1 Beav. 235; *Balfour v. Welland*, 16 Ves. 156.

(s) 1 Phil. 722, note.

(t) See *Lowes v. Lush*, 14 Ves. 547.

should in no case be bound to see to the application of the money. Where a trust for sale exists, and there is no collusion, clearly the purchaser would not now be bound to see to the application of the money.(u) A merely fraudulent sale, by collusion with the trustee, of course could not stand. If a devisee had a right to sell, but he sold to pay his own debt, which was a manifest breach of trust, and the purchaser was aware or had notice that such was its object, the rule could afford him no protection.(x) And in a clear case of collusion the purchaser would still be liable.(y) But where a man as heir was entitled to the estate, subject to the debts by law, or as devisee was entitled, subject to the debts, or debts and legacies, charged by the will, and which charge by implication included a power or trust to sell or mortgage, it was no objection that it appeared by the conveyance that the party who sold was dealing with the purchaser as owner of the estate; for he was in truth the owner, subject to a charge, and it was his duty to satisfy the charge, which the sale might be the means of enabling him to do.(z) It may be

(u) *Stroughill v. Anstey*, 1 De G., M. & G. 635. [Mr. Greenleaf says (1 Cruise Dig. tit. 12, c. 4, § 36, note), that in the United States the English doctrine, in regard to the application of the purchase money, has rarely been administered except in cases of fraud in which the purchaser was a coadjutor; the general rule here being that the purchaser, who in good faith pays the purchase money to the person authorized to sell, is not bound to look to its application; and that there is no difference in this respect between lands changed in the hands of an heir or devisee with the payment of debts, and lands devised to a trustee to be sold for that purpose. See, also, *Elliot v. Merryman*, 1 Lead. Cas. in Eq. (3d Am. ed.) 97, [45] *et seq.* & notes; *Duffy v. Calvert*, 6 Gill, 48; *St. Mary's Church v. Stockton*, 4 Halst. Ch. 520; *Cryder's Appeal*, 11 Penn. St. 72; *Clyde v. Simpson*, 4 Ohio N. S. 445, 464; *Redheimer v. Pyron*, 1 Spears Eq. 135, 141; *Champlin v. Haight*, 10 Paige, 275; *S. C. 7 Hill*, 245; *Wormley v. Wormley*, 8 Wheat. 422, 442; *Gardner v. Gardner*, 3 Mason, 178,

215; *Jackson v. Updegraffe*, 1 Rob. 107, 120. The strict doctrine of the English law upon this subject is enforced in the American courts with apparent reluctance. See *Dalzell v. Crawford*, 1 Pars. Eq. 57; *Rutledge v. Smith*, 1 Busb. Eq. 283; *Redheimer v. Pyron*, 1 Spears Eq. 141.]

(x) *Eland v. Eland*, 4 My. & Cra. 427.

(y) *Burt v. Trueman*, 29 L. J. N. S. 902. [*Potter v. Gardner*, 12 Wheat. 498; *Garnett v. Macon*, 6 Call, 308; 2 Brock. 185. Where the purchaser has notice, or the circumstances are such that he must be presumed to have had notice, that the sale is being made for an unauthorized purpose, he takes the property subject to all the liabilities of the trust. See *Walker v. Taylor*, 8 Jur. N. S. 681; 2 Dart V. & P. (4th Eng. ed.) 553.]

(z) *Eland v. Eland*, 4 My. & Cra. 427, 428; *Higgins v. Shaw*, 2 Dru. & War. 356; *Stroughill v. Anstey*, 1 De G., M. & G. 635; *M'Nelly v. Acton*, 4 De G., M. & G. 744; *Colyer v. Finch*, 5 H. L. Cas. 905.

that the devisee subject to the charge is a trustee for others, yet he may sell * or mortgage, and give a good discharge for the purchase money, only in that case he could not assume to sell as the owner of the estate.(a)(1) This point is, of course, no longer open to doubt.

2. Where the trust was to raise so much money as the personal estate should prove deficient in paying the debts, or debts and legacies, of course the purchaser was not bound to ascertain the deficiency.(b) But where a *mere power* is given to trustees to sell, for the purpose of raising as much money as the personal estate shall prove deficient in paying the debts, or debts and legacies, it seems that unless the personal estate be actually deficient, the power does not arise, and consequently cannot be duly executed.(c) As the power is not well executed unless there be a deficiency, a purchaser, before the late act, must at his peril have ascertained the fact, notwithstanding that the trust was for payment of debts generally; or being for payment of particular debts or legacies, the *common clause*, that the trustees' receipts should be sufficient discharges, were inserted in the instrument creating the trust. And this necessity is not removed by the act. Wherever, therefore, a power of this nature is given, and

(a) Ball v. Harris, 4 My. & Cra. 264; Jones, 327; 1 Ro. Ab. 329, pl. 9; 3 Vin. Dolton v. Hewan, *sup.* Ab. 419, pl. 9; Pierce v. Scott, 1 Yo. &

(b) Fearn's Posth. p. 121; Butler, n. Col. 257; where estate A. was to be sold (1), Co. Litt. 290 b, s. 12; Bird v. Fox, 11 before estate B., see the judgment; Culpepper v. Aston, 2 C. C. 221; 2 C. Ca. Hare, 40.

(c) Dike v. Ricks, Cro. Car. 335; Wm. 115.

(1) Robinson v. Lowwater, 17 Beav. 601, 5 De G., M. & G. 272, and Wrigley v. Sykes, 21 Beav. 337 (see Sabin v. Heape, 5 Jur. N. S. 1146; Hall v. Hurts, 2 J. & H. 76), introduced considerable difficulty upon titles, by implying a power of sale in executors from a charge of debts, although the estate was devised to others. This was contrary to the received opinion. See an article in the Jurist, vol. 2, N. S. 68; and Colyer v. Finch, 5 H. L. Cas. 905, and see 6 E. & B. 619; Bolton v. Stannard, 4 Jur. N. S. 576; Hodkinson v. Quinn, 1 J. & H. 303, where a sale by trustees, under an express trust, the time for sale having arrived, was of course supported against any supposed power by implication in the executors. The trust was treated as a power; but it seems to be a case in which the trustees took the fee upon trusts, with a clear trust for sale at the time appointed, and in which it would be difficult, looking at the whole frame of the will, to raise a power by implication in the executors; Cook v. Dawson, 29 Beav. 123; [3 De G., F. & J. 127,] and consider the points stated in the judgment to be settled.

The law is now made clear by 22 & 23 Vict. c. 35, s. 14, 15, 16, 17, 18; see *sup.* ch. 12, s. 4.

even where a trust for such purposes is raised, it seems advisable, as Mr. Butler remarked, to expressly discharge the purchaser or mortgagee from the obligation of inquiring whether the personal estate has been got in and applied; and to expressly authorize the trustees to raise any money they may think proper by sale or mortgage, though the personal estate be not actually got in or applied. There should be a further direction, that so much of the personal estate, and the money raised under the trust, as shall remain after answering the purposes of the * trust, shall be laid out in land, to be settled on the devisees of the real estates.(d)

3. Difficulties at times arose where trust money was lent upon real estate, and there was no express authority to the trustees to vary the securities, or to give discharges for the money, although such an authority must, it should seem, be deemed within the general power of such trustees from the necessity of the case; but in a case where one of several trustees of a fund, which was directed to be invested upon security for *cestuis que trust* without any further direction, lent it by his description of such trustee, the master of the rolls refused to compel the purchaser to accept the title upon the receipt of the mortgagee-trustee alone, although he expressed an opinion that the payment to such a trustee was not a breach of trust.(e) In such a case a power to vary the securities,(e¹) or, in other words, to receive the money which the mortgagor has a right to pay off, must exist somewhere; and where can it exist if not in the person by whom the advance of the money was made? In a later case where trustees with a power to vary securities, and to give receipts which should be discharges, advanced their trust stock on mortgage, and the proviso for redemption was on *retransfer of the stock*; and upon a sale of a portion of the estate, the trustees received the purchase money in cash, and the purchase was completed, it was held that a subsequent purchaser was not bound to accept the title; and this decision was, with some reluctance, affirmed upon

(d) Butl. n. Co. Litt. 290 b.

(e) *Hanson v. Beverley*, 17 Mar. 1832; Reg. lib. A, 1831, fol. 1110; the bill dismissed with costs; *Wood v. Harman*, 5 Mad. 368.

(e¹) [If the trustee has authority to in-

vest the trust fund and a power of varying securities, but without any express power of signing receipts, it is implied from the nature of the trust that he shall sign receipts. *Lewin Trusts* (5th Eng. ed.), 339; *Locke v. Lomas*, 5 De G. & S. 326.]

appeal, for the trustees were not authorized to receive money, and there was nothing to show that the trustees had any intention of investing on real securities, and they would not have been justified in selling the stock without the intention of investing it on other security.(f) But if an estate were simply made a security by way of indemnity to one trustee in consequence of the fund being advanced to the other, that would not impress the estate with the trusts of the money, so as to prevent a sale without the concurrence of the *cestuis que trust*.(g)

4. Where three trustees under their trust sold to a purchaser, and gave a receipt for the whole of the purchase money, but only received part of it, and the deeds were deposited with one of them, the acting trustee, to secure the residue, and the purchaser paid the balance to that trustee, he was held still liable to the *cestuis que trust*, for although the trustees had power to invest the money on real securities, this equitable deposit to one was a breach of trust. But the court observed that there was no authority for holding a man liable * to pay over again purchase money which he had paid to one of several trustees upon a receipt signed by them all.(h)

5. A contract for sale, as we have seen, converts the estate in equity into personalty.(i) And therefore, if an estate be devised to a trustee for sale, and his receipt be made a valid discharge, and afterwards the testator himself sell the estate, his executor would be the right hand to receive the money, and not the trustee, even if the will state the testator's intention to sell, and direct the trustee to carry into execution any contract for sale entered into by him in his lifetime, and remaining uncompleted at his death — for the provision in the will as to the receipts of the trustee, is not applicable to a case in which the testator in his lifetime made the contract for sale; and it was not competent for the testator to impose fetters on the performance of the contract he had entered into. When he had sold any part of his estates, the receipt clause, from the very nature of the case, became inapplicable; the executor of the testator then became the proper party to give the receipt for the purchase money.

(f) *Pell v. De Winton*, 2 De G. & J. 13, *qu.*, and consider the case.

(g) *Groom v. Booth*, 1 Drew. 548.

(h) *Webb v. Ledsam*, 1 Kay & J. 385.

(i) *Sup. c. 5, s. 1*; *Eaton v. Sanxter*, 6 Sim. 517.

6. If the names of the trustees be inserted in the usual clause, that the receipts of the trustees shall be discharges, every trustee who has accepted the trust must join in the receipt for the purchase money, although he may have released the estate to the other trustees.^(k) But a trustee who has refused to accept the trust, and actually renounced, need not join in any receipts.^(l) And a release may be considered as a disclaimer.^(m) This of course cannot apply to any case where the trustee has acted in execution of the trusts, for the estate is then vested in him, and it is too late to disclaim. The disclaimer may be by deed, or, it should seem, by parol.⁽ⁿ⁾ A disclaimer by deed by one executor, subsequently to the exercise of a power by the others, may be taken as a refusal *ab initio*, and the disclaimer by an executor may be of copyholds, so as to give to the others the power to sell under the statute of Henry 8; ^(o) of course the survivor of trustees to sell to whom the legal estate has survived can sell the estate, although the testator speaks of his trustees, and there is a discretion to sell or mortgage.^(p)

7. Where a term was raised to secure a sum of money for A., and he assigned the money to B. by way of mortgage, and the trustee of * the term assigned it to C., to raise the original sum by sale or mortgage, and to pay the expenses and the mortgage money and interest, and the residue to A.; and in case default should be made in payment of the mortgage money, B. and C., or either of them, were empowered to sell the sum assigned and the term, and their or either of their receipts were made good discharges to the purchaser; and there was a power of attorney from A. to B. to receive the original sum, and to give receipts and releases for the same; (1) the original sum was paid off upon a sale of the inheritance, and the receipt clause was not held

(k) *Crewe v. Dicken*, 4 Ves. 97, *post*; 365; *Townson v. Tickell*, 3 Bar. & Ald. 31; *Bingham v. Clanmorris*, 2 Mol. 253; *Small v. Marwood*, 9 B. & C. 307; 4 Man. 181; [Lewin Trusts (5th Eng. ed.), 349; see *Vandever's Appeal*, 8 Watts & S. 405.] *Begbie v. Crook*, 2 Bing. N. C. 70; *Urch v. Walker*, 3 My. & Cra. 702.

(n) *Doe v. Smyth*, 6 B. & C. 112.

(l) *Sir W. Smith v. Wheeler*, 1 Vent. 128; *Hawkins v. Kemp*, 3 East, 410;

(o) *Peppercorn v. Wayman*, 5 De G. & Sm. 230; 21 H. 8, c. 4.

Adams v. Taunton, 5 Mad. 435.

(p) *Lane v. Debenham*, 17 Jur. 1005.

(m) *Nicolson v. Wordsworth*, 2 Swan.

(1) There was an assignment, but the same question arose upon that deed.

applicable to the present case, where the money for which receipts were to be given had been raised, not by sale or mortgage of either the original sum or the term, but by a sale of the inheritance of the estate.^(q) The V. C. said the question was, whether on account of the difference in the language used in the two parts of the deed, the party must not be taken to have intended that there should be an inherent difference between receipts given under the power of attorney and those given under what is usually called the receipt clause. He did not think that the court had ever decided that a receipt given under the former was to be taken as equivalent to a receipt given under the latter. We may observe, however, that each authority had its own operation, and that the power of attorney provided for the very case which happened, and a sufficient discharge might have been given under it. It would be difficult to support the decision.

8. Where a security was given to two to secure sums advanced by them, *or either of them*, yet as the security was made to them jointly, the representative of the survivor was held capable of giving a discharge for the whole, as he was a trustee for the one who died first.^(r)

9. If an estate is vested in trustees to sell, with power to give receipts, but no power is added to appoint new trustees, and upon a bill filed, the court appoints new trustees, they can give a valid discharge;^(s) for the conveyance binds the legal estate, and the decree of the court binds the equity, but that does not authorize the trustee or his heir to appoint a new trustee;^(t) nor where the trust is confined to a trustee and his heirs can the trustee devise the estate so as to constitute his devisees, trustees capable of giving a receipt,^(u) for of course he can devise the trust estate,^(x) although this is a very strict construction of the rule. This construction was adopted by *analogy to the cases upon powers which it has been determined cannot be exercised even by trustees appointed by the court in the place of the orig-

(q) *Brasier v. Hudson*, 9 Sim. 1.

(r) S. C.; see the clauses in the deed, p. 3; 7 & 8 Vict. c. 76; 8 & 9 Vict. c. 106, *sup.*

(s) *Drayson v. Pocock*, 4 Sim. 283.

(t) *Bradford v. Belfield*, 2 Sim. 264.

(u) *Cooke v. Crawford*, 13 Sim. 91;

Mortimer v. Ireland, 6 Hare, 196; *Ashton v. Wood*, 3 Sm. & Gif. 436; *Stevens v. Austen*, 7 Jur. N. S. 873.

(x) *Wilson v. Bennett*, 5 De G. & Sm. 475.

inal trustees, because they are not the persons in whom the settlor reposed confidence.(y) Even where the estate was vested in trustees in fee by a will, and they and the survivors and survivor of them, his heirs, executors, or administrators were empowered to sell the estate, a title under devisees of the surviving trustee was considered too doubtful to be forced on a purchaser, although one of them was the heir of the surviving trustee; for the estate and power were severed by the devise.(z) It is now, however, settled that where the devise or trust is extended to assigns, the devisee of the surviving trustee can make a good title.(a) In the case of *Welstead v. Colvile*,(b) it was decided that upon the appointment of a new trustee in lieu of a deceased trustee by a party beneficially interested under a will which devised the estate to trustees to sell, a good title could be made by the remaining trustees and the new trustees, the former conveying, and all receiving the purchase money, although the estate had not been conveyed to the old and new trustees according to the direction of the will. This really admitted of no doubt; the legal fee was in the surviving trustees, and the money was payable to them and the new trustee. So where a man having mortgaged his estate in fee devised it to a trustee to sell, and made him his executor, the trustee disclaimed both the trusts and executorship. The heir-at-law took out administration and sold the estate under the trusts, and he and the mortgagee conveyed it to the purchaser, who was held to have a good title, for he had the legal fee and the equitable interest.(c) And now, as we have seen,(d) as to wills coming into operation after the act, devisees in trust of the whole of the testator's interest in an estate, charged with debts or any legacy, without any express provision for raising the same, may, notwithstanding any trusts declared by the testator, sell or mortgage, to raise the debts or legacies. And these powers extend to persons becoming entitled

(y) Sugd. Pow. (8th ed.) 889; *Newman & Gif.* 436; *Saloway v. Strawbridge*, 1 v. Warner, 1 Sim. N. S. 457; see *Byam v. K. & J.* 376, 7 De G., M. & G. 594. *Byam*, 19 Beav. 58; *Bartley v. Bartley*, 3 (b) 28 Beav. 537; *Warburton v. Sandys*, 14 Sim. 622, Sugd. Pow. (8th edit.) Drew. 384.

(z) *Wilson v. Bennett*, 5 De G. & Sm. 846.
475. (c) *Austin v. Martin*, 29 Beav. 523.

(a) *Hall v. May*, 3 K. & J. 585; see (d) 22 & 23 Vict. c. 35, s. 14-18; see *Ashton v. Wood*, 3 Jur. N. S. 1164, 3 Sm. ch. 12, s. 4, *supra*.

by survivorship, descent, or devise, or who may be appointed under any power in the will or by the court of chancery. And where in such a case the testator's whole interest shall not be devised to trustees, the executors may exercise the like power. And such power will devolve to the person in whom the executorship shall for the time being be vested. And purchasers and mortgagees are not bound to inquire whether the powers have been duly * exercised, but the act does not extend to a devise to any person in fee or in tail, or for the testator's whole interest charged with debts or legacies, nor does it affect the power of any such devisee to sell or mortgage as he might by law then do. By a late statute a summary general power is given to the court to appoint new trustees, either in substitution for or in addition to any existing trustees, and they are to have the same rights and powers as they would have had if appointed in a suit duly instituted.(e)

10. Purchasers frequently run considerable risk in paying the purchase money to the agent or solicitor of the seller upon the delivery of the conveyance; of course, if the agent is duly authorized to receive it, there will be no risk; (e¹) but that is often not the case, and particularly where sales are made by trustees, who are all bound to join in the receipt, and who would not be justified in allowing their solicitor to receive the purchase money being trust money.(f) But if the solicitor is also one of several trustees, and he act for himself and the other trustees, a payment of the purchase money to him will be held to have been in his character of trustee,(g) but even such a payment should be avoided. Where the same solicitors were employed by both

(e) 13 & 14 Vict. c. 60, s. 32, 33; 15 & 16 Vict. c. 55; Sugd. Stat. (2d ed.) 141; and see 19 & 20 Vict. c. 120, and 21 & 22 Vict. c. 77, for facilitating leases and sales of settled estates.

(e¹) [An attorney who has authority to make contracts for the sale of land, or to convey land for cash, has a power to receive the purchase money, or so much thereof as is to be paid in hand, on the sale, as an incident to the power to sell Story Agency, § 58; Peck v. Harriott, 6 Serg. & R. 149; Yerby v. Grisby, 9 Leigh, 387; Johnson v. McGruder, 15 Miss. 365;

Higgins v. Moore, 6 Bosw. 344; ante, 48, note.]

(f) See Macdonnell v. Harding, 7 Sim. 176; Vandaleur v. Blagrave, 6 Beav. 565; aff'd 9 Beav. Add.; Young v. Guy, 8 Beav. 147, Tylee v. Webb, 14 Beav. 14; Griffin v. Clowes, 20 Beav. 61; see and consider Hope v. Liddell, 21 Beav. 183; sup. Rushout v. Turner, 30 L. T. 89, a case of trustees, mortgagees, one a solicitor; fraud. [See Lewin Trusts (5th Eng. ed.), 329.]

(g) In re Fryer, 3 K. & J. 317.

sellers and purchaser, and they had sufficient moneys in their hands belonging to the purchaser to pay the purchase money, which he directed them, but which they failed to do, the purchaser was held to be still liable for the money. The solicitors were authorized to receive the purchase money, and in an account which was acted upon by some of the parties, the solicitors treated themselves as having received the purchase money, for which they gave credit to the sellers, and debited the purchaser with the amount, but this mode of payment had not been sanctioned by other parties, and the purchaser was compelled to pay them their shares.^(h) Upon a purchase where there were several sets of trustees entitled to the property in shares, as it was impossible that they should be got together to receive the money, an account was opened for each set of trustees at a banker's, with whose responsibility the purchaser was satisfied, and the share of the purchase money belonging to each set was paid in by the purchaser to their account, and by their direction. This was considered by the writer to be as good a plan as could be devised for his own safety. In a recent case,⁽ⁱ⁾ it was held that, as a general rule, the purchaser has a right to pay the purchase money to the *seller himself. He may not have the right to make the seller come to him to be paid, but he has a right to go to him. The court would not positively say how it would be where there was a power of attorney. Upon an appeal it was considered that a written authority would be sufficient, but the solicitor as such has no right to receive the money.^(k) A late case ^(l) shows the danger to which a purchaser is exposed in accepting a deed and paying the money without the presence of all the sellers. Three persons (who were trustees) advanced money to a railway company on debentures, which were left in the custody of one of them; he sold the debentures to a great public company and forged the names of his two co-trustees to the transfer, which was registered by the railway company and the dividends paid accordingly, but upon a bill filed by the two

^(h) *Wrouit v. Dawes*, 25 Beav. 369.

^(k) *Bourdillon v. Roche*, 27 L. J. N. S.

⁽ⁱ⁾ *Viney v. Chaplin*, 4 Drew. 237, 2 681.

De G. & J. 468.

^(l) *Cottam v. East. Count. Ry. Co.* 1 J. & H. 243.

whose names were forged, the purchasers were compelled to give up their security.

11. A purchaser should not pay his purchase money upon a personal undertaking of the seller's solicitor to do certain acts to establish the title, as he may find much difficulty in enforcing the undertaking.(*m*)

IV. 1. As to leasehold estates, a purchaser of personalty is in no case bound to see to the application of the purchase money where he purchases *bonâ fide*; (*n*) but an executor cannot now dispose of his testator's property, as a security for, or in payment or satisfaction of, his own debts.(*o*) And an agreement for a

(*m*) *Peart v. Bushell*, 2 Sim. 38.

(*n*) *Elliot v. Merryman*, Barn. R. C. 78, 2 Atk. 41; *Watts v. Kancy*, Tot. 141; *S. C. Ib.* 227, *nom.* *Mutts v. Kancie*; *Nurton v. Nurton*, *Ib.*; *Humble v. Bill*, 2 Ver. 444; 1 Eq. Ca. Ab. 358, pl. 4; *Savage v. Humble*, 1 Bro. P. C. 71; 17 Ves. 160, 161; *Ewer v. Corbet*, 2 P. Wms. 148; *Bunting v. Stonnard*, 2 P. Wms. 150; *Andrew v. Wrigley*, 4 Bro. C. C. 137; *Dickenson v. Dickenson*, 4 Ves. 36. [See 1 Story Eq. Jur. §§ 422, 578; 2 Story Eq. Jur. §§ 1128, 1129. In *Field v. Schieffelin*, 7 John. Ch. 160, Mr. Chancellor Kent said: "I have thus looked pretty fully into the decisions in the analogous case of a purchaser from an executor of the testator's assets; and they all agree in this: that the purchaser is safe, if he is no party to any fraud in the executor, and has no knowledge or proof that the executor intended to misapply the proceeds, or was in fact by the very transaction, applying them to the extinguishing of his own private debt. The great difficulty has been, to determine how far the purchaser dealt at his peril, when he knew from the very face of the proceeding that the executor was applying the assets to his own private purposes, as the payment of his own debt. The later and better doctrine is, that in such a case he does buy at his peril, but that if he has no such proof or knowledge, he is not bound to inquire into

the state of the trust, because he has no means to support the inquiry, and he may safely repose on the general presumption that the executor is in the due exercise of his trust." As to the subject of the transfer of assets by executors; see 1 Story Eq. Jur. §§ 422-424; *Allender v. Ritson*, 2 Gill & J. 86; *Ram on Assets*, 491, 492; *Rayner v. Pearsall*, 3 John. Ch. 578; *Knight v. Yarborough*, 4 Rand. 566; *M'Alister v. Montgomery*, 3 Hayw. 94.]

(*o*) *Nugent v. Gifford*, 1 Atk. 463; *Mead v. Lord Orrery*, 3 Atk. 235; *Ithell v. Beane*, 1 Ves. 215; *Scott v. Tyler*, 2 Dick. 724; 2 Bro. C. C. 431; 17 Ves. 164; *Bonney v. Ridgard*, 2 Bro. C. C. 433; 4 Bro. C. C. 130; 7 Ves. 167; *Andrew v. Wrigley*, 4 Bro. C. C. 125; *Hill v. Simpson*, 7 Ves. 152; *Lowther v. Lowther*, 13 Ves. 65; 17 Ves. 169; *Cubbidge v. Boatwright*, 1 Rus. 549; *M'Leod v. Drummond*, 14 Ves. 353, 17 Ves. 152; *Farr v. Newman*, 4 T. R. 621; *Keane v. Roberts*, 4 Mad. 332; *Haynes v. Forshaw*, 11 Hare, 93; *Collinson v. Lister*, 7 De G., M. & G. 634; [*Williamson v. Morton*, 2 Md. Ch. 94; *Miller v. Williamson*, 5 Md. 219; *Wilson v. Doster*, 7 Ired. Eq. 231; *Dodson v. Simpson*, 2 Rand. 294; *Williams v. Branch Bank*, 7 Ala. 906; *Field v. Schieffelin*, 7 John. Ch. 150, 157, 158; *Petrie v. Clark*, 11 Serg. & R. 377, 385; *Graff v. Castleman*, 5 Rand. 195.]

sale by one executor, on behalf of himself and his co-executor for whom he believed he was authorized to act, or that he would ratify the sale, was not enforced, although the purchaser had paid a deposit, accepted the title, obtained possession, and laid out money in improvements.(p) But although executors can make an assignment and give a receipt for purchase money before probate, yet a purchaser cannot be compelled to pay the money before probate.(q)

* 2. If the executor sell at an undervalue, or to one who has notice that there are no debts, or that all the debts are paid,(r) or if there be any express or implied fraud or collusion between the executor and purchaser, the sale cannot be supported.(s) Fraud and covin will vitiate any transaction, and turn it to a mere color. If one concert with an executor or legatee, by obtaining the testator's effects at a nominal price, or at a fraudulent undervalue, or by applying the real value to the purchase of other subjects for his own behoof, or in extinguishing the private debt of the executor, or in *any other manner* (which Lord Eldon said are very material words), contrary to the duty of office of executor, such concert will involve the seeming purchaser, and make him liable for the full value.(t)

3. But if the legatee permit a long time to elapse without asserting his claim, and there are several mesne purchasers, equity will not set aside the sale, although there are suspicious circum-

(p) *Sneesby v. Thorne*, 7 De G., M. & G. 399. [But it has been held that, as respects chattels real, any one of several executors can sell, and can give a good discharge for the entire purchase money. *Cole v. Miles*, 10 Hare, 179; *Sneesby v. Thorne*, 7 De G., M. & G. 399; S. C. 1 Jur. N. S. 586.]

(q) *Newton v. Metrop. Ry. Co.* 1 Drew. & Sm. 583.

(r) *Ewer v. Corbet*, 2 P. Wms. 148; [*McMullen v. O'Reilly*, 15 Ir. Ch. Rep. 251; 2 Dart V. & P. (4th Eng. ed.) 552.]

(s) *Crane v. Drake*, 2 Ver. 616; Vin. 43, pl. 13; 18 Vin. 121, pl. 11, side notes; *Bonney v. Ridgard*, 2 Bro. C. C. 438, cited; *Nugent v. Gifford*, 1 Atk. 463;

Gilb. E. R. 113; *Prec. C.* 434; *Whale v. Booth*, 4 T. R. 625, n.; 17 Ves. 167; [*Field v. Schieffelin*, 7 John. Ch. 150, 155, 156; *Petrie v. Clarke*, 11 Serg. & R. 377, 385; 2 Story Eq. § 1129; *Miller v. Williamson*, 5 Md. 219; *Wilson v. Doster*, 7 Ired. Eq. 231; *Williamson v. Morton*, 2 Md. Ch. 94; *Dodson v. Simpson*, 2 Rand. 294; *Williams v. Branch Bank*, 7 Ala. 906; *Howard v. Chaffer*, 9 Jur. N. S. 767; *Elliot v. Merryman*, Barn. 78, 81; *Chambers v. Howell*, 12 Jur. 905; *Miles v. Durnford*, 2 De G., M. & G. 641; *Haynes v. Forshaw*, 11 Hare, 99.]

(t) 2 Dick. 725; see 1 Bur. 475; *Walker v. Taylor*, 8 Jur. N. S. 681; [*McMullen v. O'Reilly*, 15 Ir. Ch. Rep. 251.]

stances of fraud.(u) And although the legatee has only a contingent interest or a claim in remainder, yet that will be no excuse for delay.(x) (1)

4. A particular chattel specifically bequeathed may, it seems, be safely purchased from an executor,(y) but certainly, in some cases, such a purchase could not be recommended without the concurrence of the legatee, because the executor may have assented to the bequest; (z) but this difficulty is not likely to arise where the sale is recently after the death, or the possession accompanies the purchase. But no question can arise where the specific legatee of the chattel is also executor.(a) And an executor may sell until there * is a decree in a suit for administering the assets.(b) So an executor or administrator may mortgage *bonâ fide*, and give a power of sale to the mortgagee, a sale under which would be enforced against a purchaser.(c)

(u) *Bonney v. Ridgard*, 2 Bro. C. C. C. R. 78; *Andrew v. Wrigley*, 4 Bro. C. C. 438; 17 Ves. 97, 165; *Scott v. Dunbar*, 1 Mol. 442.

(x) *Andrew v. Wrigley*, 4 Bro. C. C. 125; but see *Ld. Bandon v. Becher*, 3 Cl. & Fin. 479; *Mead v. Ld. Orrery*, 3 Atk. 241, 17 Ves. 161, 162; see *Browne v. Cross*, 14 Beav. 105; *Life Association of Scotland v. Siddall*, 7 Jur. N. S. 785.

(y) *Langley v. Ld. Oxford, Amb.* 17, [more fully stated in Mr. Hovenden's note to *Taylor v. Hawkins*, 8 Ves. (Sumner's ed.) 209, 213;] *Elliot v. Merryman*, Barn.

(z) *Thomlinson v. Smith, Finch*, 378.

(a) *Taylor v. Hawkins*, 8 Ves. 209; *Atty. Gen. v. Potter*, 5 Beav. 164; where there are several executors, see *Cole v. Muddle*, 10 Hare, 186.

(b) *Neaves v. Burrage*, 14 Jur. 177; see *Maltby v. Russell*, 2 Sim. & Stu. 227; see p. 401, *supra*.

(c) *Russell v. Plaice*, 18 Beav. 21; 2 Eq. R. 1149.

(1) In *Howarth v. Powell*, Ld. Keeper Henley said, that a party having a claim in remainder to an estate, though not to the possession, if he sees the possession wrongfully usurped, ought to file his bill for relief before his right to possession accrues, for otherwise he stands by and countenances the possessor in his act of ownership, MS. S. C. 1 Ed. 351, *nom.* *Howarth v. Deem*.

CHAPTER XIX.

OF THE VENDOR'S LIEN ON THE ESTATE FOR THE PURCHASE MONEY UNPAID: AND THE DISCHARGE OF IT BY TAKING OTHER SECURITIES.

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|---|---|
| <ol style="list-style-type: none"> 1. Vendor's lien. 2. Purchaser's lien. 3. { Vendor's lien, although agreement for 6. { bond during the seller's life; <i>Winter</i> <i>v. Lord Anson.</i> 4. No lien where conveyance in consideration of covenants: <i>Glarke v. Royle.</i> 5. <i>Clarke v. Royle</i> not overruled. 6. Mortgage to third person with seller's consent: no lien. 7. Bonds with sureties. 8. Loan not lien. 9. Covenant by purchaser and surety, and consent required to resale. — Conveyance for bond; no lien: <i>Parrot v. Sweetland.</i> 10. Intention not important. 11. Money to be paid after resale: no lien. 12. Independent security: no lien. — As upon stock. — Mortgage of another estate, or of estate sold for part. 13. A bond and mortgage of part of estate: no lien. 14. Bond or note does not destroy lien. 15. Effect of a covenant. 16. Annuity the price, whether bond or note excludes the lien. 17. Part left with one trustee where several sell. 18. Lien of trustees on new purchase by tenant for life. | <ol style="list-style-type: none"> 19. Lien for part and none for rest. 20. Set-off against assignees. 21. Action and suit by the seller at the same time not allowed. 22. Declaration to prevent lien. 23. Assets marshalled. 24. Contribution. 25. Vendor keeping the deeds. 26. Lien prevails against whom. 27. Possession of seller as lessee not notice. 28. Assignees of bankrupt bound by lien. 29. Sale under lien. 30. Lien on plant; bankruptcy. 31. Creditors under conveyance bound. 32. <i>Qui prior est tempore potior est jure.</i> 33. Equitable mortgagee by deposit of deeds overreaches lien. 34. Priorities according to time. 35. Fraudulent mortgage; deposit with notice, purchaser relieved. 36. Deposit of deeds binds the crown. 37. Security for purchase money to third person. 38. Assignment of lien. 39. Pledge by seller of conveyance to purchaser. 41. Barred by non-claim. 42. Lien not a security of money within a bequest. |
|---|---|

1. WHERE a vendor delivers possession of an estate to a purchaser, without receiving the purchase money, equity, whether the * estate be (a) or be not (b) conveyed, and although there was

(a) *Chapman v. Tanner*, 1 Ver. 267; *Scott*, 2 Wash. 141; *M'Tear v. Buttorf*, 4 Pollexfen v. Moore, 3 Atk. 272; 1 Bro. C. C. 302, 424; 6 Ves. 483; *Mackreth v. Symmons*, 15 Ves. 329. [See *Green v. Crockett*, 2 Dev. & Bat. Eq. 393; *Cole v.*

Yeates, 300.]

(b) *Smith v. Hibbard*, 2 Dick. 730; *Charles v. Andrews*, 9 Mod. 152; *Topham v. Constantine*, Taml. 135; *Evans v.*

not any special agreement for that purpose, and whether the estate be freehold or copyhold,^(c) and whether the whole or only part of the money is unpaid,^(d) gives the vendor a lien on the land for the money,^(d¹) but this does not prevail at law; ^(e) nor in

Tweedy, 1 Beav. 55; Wrout v. Dawes, 25 Beav. 369; Wilson v. Keating, 5 Jur. N. S. 815.

(c) Winter v. Ld. Anson, 3 Rus. 488.

(d) *Infra*.

(d¹) [This lien of the vendor is wholly independent of any possession on his part; and it attaches to the estate as a trust equally, whether it be actually conveyed, or only be contracted to be conveyed. 2 Story Eq. Jur. § 1218; McLearn v. McLellan, 10 Peters (U. S.), 625; Champion v. Brown, 6 John. Ch. 398; Haley v. Bennett, 5 Porter, 452; Hill v. Grigsby, 32 Cal. 55. The principle upon which courts of equity have proceeded in establishing this lien in the nature of a trust is, that a person, who has gotten the estate of another, ought not in conscience, as between them, to be allowed to keep it and not to pay the full consideration money. A third person, having full knowledge that the estate has been so obtained, ought not to be permitted to keep it without making such payment; for it attaches to him also as a matter of conscience and duty. It would otherwise happen that the purchaser might put another person into a predicament better than his own, with full notice of all the facts. 2 Story Eq. Jur. § 1219. The true origin of the doctrine may, with high probability, be ascribed to the Roman law, from which it was imported into the equity jurisprudence of England. 2 Story Eq. Jur. § 1221; Clower v. Rawlings, 9 Sm. & M. 122. In Gilman v. Brown, 1 Mason, 181, 221, Mr. Justice Story said: "The lien of a vendor for the purchase money is not of so high and stringent a nature as that of a judgment creditor, for the latter binds the land according to the course of the common law, whereas the former is a mere creature of a court of equity, which it moulds and fashions according to its own purposes.

It is, in short, a right which has no existence until it is established by the decree of a court in the particular case; and is then made subservient to all the other equities between the parties, and enforced in its own peculiar manner, and upon its own peculiar principles. It is not, therefore, an equitable estate in the land itself, although that appellation is loosely applied to it." See Pratt v. Van Wyck, 6 Gill & J. 495; Williams v. Young, 17 Cal. 403; 21 Cal. 227; Keith v. Horner, 32 Ill. 524; 1 Lead. Cas. in Eq. (3d Am. ed.) 374, 375. This lien of the vendor for the purchase money prevails to the same extent in the case of a sale of the equitable, as of the legal title. Stewart v. Hutton, 3 J. J. Marsh. 178; Ligon v. Alexander, 7 J. J. Marsh. 288, 289; Galloway v. Hamilton, 1 Dana, 576; Iglehart v. Armiger, 1 Bland, 519, 526, 527. But see Schnebly v. Ragan, 7 Gill & J. 120, 124; Bayley v. Greenleaf, 7 Wheat. 46, 50. If the purchaser alleges that the lien does not exist for any reason in a particular case, the burden is on him to show the circumstances which repel the presumption of its existence or rebut the equity. 4 Kent (11th ed.), 152; Garson v. Green, 1 John. Ch. 308; Gilman v. Brown, 1 Mason, 191, 213, 214; Schnebly v. Ragan, 7 Gill & J. 120, 125; Tompkins v. Mitchell, 2 Rand. 428, 429; Allen v. Bennett, 8 Sm. & M. 672, 681; Campbell v. Baldwin, 2 Humph. 248, 258; Marshall v. Christmas, 3 Humph. 616, 617; Manly v. Slason, 21 Vt. 271. The English chancery doctrine respecting this lien has been adopted in many of the States of the Union, and in others it has been entirely rejected and the lien held not to exist. In some States the lien has been abrogated by statute. It has been adopted in New York, New Jersey,

(e) Goode v. Burton, 1 Ex. 189.

equity if the purchaser has abandoned the contract, and treated the advances as not made under it.(f) The lien is not such as

Maryland, Tennessee, Mississippi, Georgia, Alabama, Missouri, Michigan, Illinois, Indiana, Ohio, Arkansas, Kentucky, Iowa, Wisconsin, Minnesota, California, Florida, Texas, and in the United States courts. See *Stafford v. Van Rensselaer*, 9 Cowen, 316; *Garson v. Green*, 1 John. Ch. 308; *White v. Williams*, 1 Paige, 502; *Warner v. Van Alstyne*, 3 Paige, 513; *Shirly v. Sugar Ref.* 2 Edw. Ch. 505; *Champion v. Brown*, 6 John. Ch. 402; *Dubois v. Hall*, 43 Barb. 26; *Warren v. Fenn*, 28 Barb. 333; *Vandoren v. Todd*, 2 Green Ch. 397; *Brinckerhoff v. Vanciven*, 3 Green Ch. 251; *Armstrong v. Ross*, 5 C. E. Green, 109; *Herbert v. Schofield*, 1 Stockt. Ch. 492; *White v. Casanave*, 1 Harr. & J. 106; *Ghiselin v. Ferguson*, 4 Harr. & J. 522; *Pratt v. Van Wyck*, 6 Gill & J. 495; *Magruder v. Peter*, 11 Gill & J. 217; *Repp v. Repp*, 12 Gill & J. 341; *Schnebly v. Ragan*, 7 Gill & J. 120, 125; *Moreton v. Harrison*, 1 Bland. Ch. 491; *Carr v. Hobbs*, 11 Md. 285; *Hummer v. Schott*, 21 Md. 307; *Hall v. Jones*, 21 Md. 439; *Bratt v. Bratt*, 21 Md. 578; *Carrico v. The Farmers' & Merchants' National Bank*, 33 Md. 242; *Eskridge v. McClure*, 2 Yerger, 84; *High v. Batte*, 10 Yerger, 186, 835; *Thompson v. Pyland*, 3 Head, 537; *Hurley v. Coleman*, 3 Head, 265; *Brown v. Vanlier*, 7 Humph. 239; *Marshall v. Christmas*, 3 Humph. 616; *Campbell v. Baldwin*, 2 Humph. 248; *Uzzell v. Mack*, 4 Humph. 319; *Medley v. Davis*, 5 Humph. 387; *Taylor v. Hunter*, 5 Humph. 569; *Norvell v. Johnson*, 5 Humph. 489; *Ross v. Whitson*, 6 Yerger, 50; *Ellis v. Temple*, 4 Cold. 315; *Servis v. Beatty*, 32 Miss. 52; *Harvey v. Kelley*, 41 Miss. 490; *Russell v. Watt*, 41 Miss. 602; *Trotter v. Irwin*, 27 Miss. 772; *Stewart v. Ives*, 1 Sm. & M. 197; *Tanner v. Hicks*, 4 Sm. & M. 294; *Upshaw v. Hargrave*, 6 Sm. & M. 286; *Dunlop v. Burnett*, 5 Sm. & M. 702; *Mims v. Macon & Western Railroad*, 3 Kelly, 333; *Stile v. Griffin*, 27 Geo. 504; *Mims v. Lockett*, 23 Geo. 237; *Chance v. McWharter*, 26 Geo. 315; *Marine Fire Insurance Co. v. Early*, Charlton, 279; *Hampden v. Miller*, Dudley, 120; *Mounce v. Byars*, 16 Geo. 469; *Burns v. Taylor*, 23 Ala. 255; *Dennis v. Williams*, 40 Ala. 633; *Griffin v. Camack*, 36 Ala. 695; *Roper v. McCook*, 7 Ala. 318; *Haley v. Bennett*, 5 Porter, 452; *Hull v. Click*, 5 Ala. 363, 364; *Sullivan v. Ferguson*, 40 Missou. 79; *Marsh v. Turner*, 4 Missou. 53; *McKnight v. Brady*, 2 Missou. 110; *Delassus v. Poston*, 19 Missou. 425; *Davis v. Lamb*, 30 Missou. 441; *Bledsoe v. Games*, 30 Missou. 448; *Sears v. Smith*, 2 Mich. 243; *Carroll v. Van Rensselaer*, Harr. Ch. 225; *Trustees v. Wright*, 11 Ill. 603; *Dyer v. Martin*, 4 Scam. 148, 151; *McLaurie v. Thomas*, 39 Ill. 291; *Aldridge v. Dunn*, 7 Blackf. 249, 250; *Evans v. Goodlet*, 1 Blackf. 246; *Lagow v. Badollett*, 1 Blackf. 416; *Merritt v. Wiles*, 18 Ind. 171; *Cox v. Wood*, 20 Ind. 54; *Thorn v. Wilson*, 27 Ind. 370; *Anketel v. Converse*, 17 Ohio St. 11; *Williams v. Roberts*, 5 Ohio, 35; *Magham v. Coombs*, 14 Ohio, 428; *Neil v. Kinney*, 11 Ohio St. 58; *Tiernan v. Bean*, 2 Ham. 383; *Scott v. Orbinson*, 2 Ark. 202; *Shall v. Biscoe*, 18 Ark. 142; *English v. Russell*, Hemp. 35; *Burrus v. Roulhac*, 2 Bush, 39; *Maupin v. McCormick*, 2 Bush, 206; *Muir v. Cross*, 10 B. Mon. 277; *Cox v. Fenwick*, 3 Bibb, 183, 184; *Thornton v. Knox*, 6 B. Mon. 74, 75; *Fowler v. Rust*, 2 A. K. Marsh. 294; *Mosely v. Garrett*, 1 J. J. Marsh. 212; *Ligon v. Alexander*, 7 J. J. Marsh. 288, 289; *Stewart v. Hutton*, 3 J. J. Marsh. 178; *Richardson v. Baker*, 5 J. J. Marsh. 323; *Hays v. Horine*, 12 Iowa, 61; *Tupple v. Viers*, 14 Iowa, 515; *Grapengether v. Fejervary*, 9 Iowa, 163; *Patterson v. Linder*, 14 Iowa, 414; *Rakestraw v. Hamilton*, 14 Iowa, 451.

(f) *Dinn v. Grant*, 5 De G. & Sm.

to deprive the seller's heir or devisee of the right to resort to the personal estate for payment of the purchase money, notwithstanding the 17 & 18 Vict. c. 113.(g)

2. So, on the other hand, if the vendor cannot make a title, and the purchaser has paid any part of the purchase money, it

147; *Piereson v. David*, 1 Iowa, 23; *McDole v. Purdy*, 23 Iowa, 277; *Toby v. McAllister*, 9 Wis. 463; *Daughaday v. Payne*, 6 Min. 443; *Hill v. Grigsby*, 32 Cal. 55; *Truebody v. Jacobson*, 2 Cal. 269; *Taylor v. McKinney*, 20 Cal. 618; *Baum v. Grigsby*, 21 Cal. 172; *Sparks v. Hess*, 15 Cal. 186; *Walker v. Sedgwick*, 8 Cal. 398; *Burt v. Wilson*, 28 Cal. 632; *Woods v. Bailey*, 3 Florida, 41; *Pinchain v. Collard*, 13 Texas, 333; *Wheeler v. Lane*, 21 Texas, 583; *McAlpin v. Burnett*, 23 Texas, 649; *Gilman v. Brown*, 1 Mason, 191; *Bayley v. Greenleaf*, 7 Wheat. 46; *Bush v. Marshall*, 6 How. (U. S.) 284; *Galoway v. Finley*, 12 Peters (U. S.), 264; *McLearn v. McLellan*, 10 Peters (U. S.), 640; *Chilton v. Braiden*, 2 Black, 458; *Cole v. Scott*, 2 Wash. 141. The doctrine is rejected in Maine, as inconsistent with the registry laws and policy of the State; and it is rejected in Pennsylvania, Kansas, and North Carolina. *Philbrook v. Delano*, 29 Maine, 415; *Irvine v. Campbell*, 6 Binn. 118; *Stouffer v. Coleman*, 1 Yeates, 393; *Kauffelt v. Bower*, 7 Serg. & R. 64; *Megarrel v. Saul*, 3 Whart. 19; *Hepburn v. Snyder*, 3 Penn. St. 72, 78; *Bear v. Whisler*, 7 Watts, 144; *Semple v. Burd*, 7 Serg. & R. 286; *Zentmyer v. Miltower*, 5 Penn. St. 403; *Springer v. Walters*, 34 Penn. St. 328; *Cook v. Trimble*, 9 Watts, 15; *Stephens's Appeal*, 38 Penn. St. 9; *Heist v. Baker*, 49 Penn. St. 9; *Simpson v. Munder*, 3 Kansas, 172; *Brown v. Simpson*, 4 Kansas, 76; *Wamble v. Battle*, 3 Ired. Eq. 182; *Henderson v. Burton*, 3 Ired. Eq. 259; *Cameron v. Mason*, 7 Ired. Eq. 180; *Gabee v. Sneed*, 1 Dev. & Bat. 333; *Wynne v. Alston*, 1 Dev. Eq. 163; *Crawley v. Timberlake*, 1 Ired. Eq. 346, 348. The doctrine was recognized and acted upon in Vermont, in the case of

Manly v. Slason, 21 Vt. 271, but it was abrogated by statute, 1851. It was acted upon for many years, in Virginia; *Graves v. McCall*, 1 Call, 414; *Handley v. Lyons*, 5 Munf. 342; *Duvall v. Bibb*, 4 Hen. & M. 113; *Hatcher v. Hatcher*, 1 Rand. 53; *Redford v. Gibson*, 12 Leigh, 332; but it is abrogated by the code. *Yancy v. Manck*, 15 Grattan, 300; *Hempfield R. R. Co. v. Thornbury*, 1 West Va. 261. In Massachusetts, this lien was alluded to in the case of *Wright v. Dame*, 5 Met. 503; but an opinion upon its existence was expressly waived by the court. See *Gilman v. Brown*, 1 Mason, 191. In New Hampshire, the court has left undecided the question whether this lien exists in that State. *Arlin v. Brown*, 44 N. H. 102; and see *Buntin v. French*, 16 N. H. 592. So it is left undecided in Connecticut. *Chapman v. Beardsley*, 31 Conn. 115; *Atwood v. Vincent*, 17 Conn. 575; *Watson v. Wells*, 5 Conn. 468; *Dean v. Dean*, 6 Conn. 285; *Meigs v. Dimock*, 6 Conn. 458. So in Delaware. *Budd v. Basti*, 1 Harr. 69. The doctrine of vendor's lien seems not to have been acted on in South Carolina. *Wragg v. Comp. Gen.* 2 Desaus. 509, 520. By statute in Kentucky, the lien of the vendor for unpaid purchase money is qualified by the requirement, that the deed shall expressly state what part of the consideration remains unpaid. *Maupin v. McCormick*, 2 Bush (Ky.), 206; *Taylor v. Ford*, 1 Bush (Ky.), 44; *Chapman v. Stockwell*, 18 B. Mon. 550. But under this statute the recital in a deed that the purchase money or any part remains unpaid, gives an express lien for the same. *Beyland v. Sewell*, 4 Bush (Ky.), 637.]

(g) *Hood v. Hood*, 3 Jur. N. S. 684; *Barnwell v. Iremonger*, 1 Drew. & Sm. 255.

seems that he has a lien for it on the estate, although he may have taken a distinct security for the money advanced.^(h) (1) The general question came before the court upon a demurrer to a bill for the deposit and subsequent advances, and for delivering up of the contract, and the demurrer was overruled. The opinion of the V. C. was in favor of the lien in the common case of an owner selling and receiving a deposit, and the contract going off for want of title, or for any other reason, not being actual misconduct on the part of the purchaser, but he did not decide the point. If such a lien can be maintained, and a mortgagee were to sell under a power, and the lien could not be established generally, so as to bind the mortgagor, yet it would prevail to the extent of his own interest.⁽ⁱ⁾ The right to a lien seems clear upon principle. In the case of a vendor who has actually conveyed, the lien remains, although he has no longer the estate. The principle is, that the lien for the purchase money represented the estate which in equity no longer was his: this right the conveyance did not defeat. Now the purchaser, upon the execution of the contract, becomes in equity owner of the estate, and the money belongs to the vendor. If all the money is paid, he obtains the estate itself. The money is in exchange for the estate. A deposit is part payment. Therefore, part * payment to that extent constitutes the purchaser actually owner of the estate: consequently if the contract do not proceed without the fault of the purchaser, the seller, to recover the equitable ownership, must repay the deposit, which, representing a portion of the interest in the property, is a lien upon it.^(i¹) In another view, the lien of the vendor for all the money may, upon receipt of a portion of the money from the purchaser, be considered as transferred to

(h) See *Lacon v. Mertins*, 3 Atk. 1; *Conner v. Banks*, 18 Ala. 42; *Manly v. Oxenham v. Esdaile*, 2 Yo. & Jer. 493, 3 Slason, 21 Vt. 271; 2 Story Eq. Jur. § 1218, in note; *Payne v. Atterbury*, Harr. Yo. & Jer. 262.

(i) *Withes v. Lee*, 3 Drew. 396; 2 Jur. Ch. 414; *Waddington v. Banks*, 1 Brock. N. S. 130; see p. 248, p. 296, and n. sup. 97; *Fenno v. Sayre*, 3 Ala. 458; *Brown v. East*, 5 Monroe, 415; *M'Jilton v. Commonwealth*, 6 J. J. Marsh. 592.]

(i¹) [See acc. *Shirley v. Shirley*, 7 Blackf. 452; *Griffith v. Depew*, 3 Marsh. 179; *McNew v. Tobey*, 6 Humph. 27;

(1) As to chattels capable of delivery, as timber felled, see *Ex parte Gwyne*, 12 Ves. 379; and as to advances by the seller, see *Ex parte Linden*, 1 Mont., Dea. & De G. 428.

that extent to the purchaser. But where the purchase cannot be enforced on the ground of its illegality, by statute, there is, it seems, no lien, for such a lien would, to that extent, be giving to the purchaser the benefit of the illegal contract.^(k)

3. And even in *Winter v. Lord Anson*, where the purchase money was to be secured by the purchaser's bond at interest, and to remain so secured during the life of the seller, on the regular payment of the interest, and the conveyance expressed all the money to be paid, but a bond was given for a large portion of it, the lien was held to exist; Sir John Leach having first decided for the lien, and ultimately against it, and upon appeal Lord Lyndhurst having preferred the first opinion, and reversed the ultimate decree.^(l)

4. In *Clarke v. Royle*,^(m) the conveyance recited a contract by A. to convey to B., in consideration of the latter entering into covenants for payment to A., during his life, of an annuity of 60*l.*, and also of his entering into the other covenant after contained; and then, in consideration of these covenants, A. conveyed the estate to B., in fee; and B. covenanted with A. to pay to him an annuity of 60*l.* for his life, and in case he, B., should marry, he, his heirs, &c., would pay, as A. should think proper, 3,000*l.* unto certain persons named in the deed. And it was held that the purchaser had no lien for the annuity, and that there was none for the 3,000*l.* The case was decided upon the authority of *Winter v. Lord Anson*.

5. When this case was decided, it seems not to have been known that *Winter v. Lord Anson* had been reversed, and, therefore, was no longer an authority in support of the view taken by the court; and it has been supposed to follow, that the case of *Clarke and Royle* was not itself an authority. The fault in the reasoning of Sir John Leach V. C. in *Winter v. Lord Anson*, appears to be that he placed the case upon grounds which did not exist. He put it as in effect a case where the conveyance was in consideration of a covenant in a deed to pay the price at a future period. But although the conveyance was in pursuance

(k) *Ewing v. Osbaldeston*, 2 My. & Floating Dock Co. L. R. 7 Eq. 409, 412, Cra. 88. 413.]

(l) *Winter v. Ld. Anson* V. C. 27 Nov. (m) 3 Sim. 499; *Parrott v. Sweetland*, 1821, MS. 1 Sim. & Stu. 434; 3 Russ. 3 My. & Ke. 655; see *Stewart v. Ferguson*, 1 Hay. 452, 13 Sim. 406, *post*. 488. [See *Earl of Jersey v. Briton Ferry*

of the agreement, yet it did not refer to it, and his reasoning, therefore, would apply to nearly every case, for in *general the agreement to take a bond or other security precedes the conveyance, although in the latter the money is expressed to be paid. Indeed, the agreement in *Winter v. Lord Anson*, was to accept a bond, and not a covenant. It would seem, therefore, to be safer to adhere to the rule as first laid down by Sir John Leach himself, and afterwards confirmed by the lord chancellor. But this would not shake the decision in *Clarke v. Royle*, for there the very case arose which was assumed to exist in *Winter v. Lord Anson*. The conveyance really was made in consideration of covenants entered into by the same deed for payment of the price; and it may be fairly considered contrary to the meaning of such a security for the purchase money, to raise another security upon the estate itself by implication from the very transaction. There is a marked distinction between a conveyance as for money paid with a separate security for the price, whether by covenant, bond, or note, and a conveyance expressed to be in consideration of covenants which the purchaser enters into by the deed itself. The price, too, might never become payable, and it appears not to have been strictly a sale, for no sale is recited, and the two parties bore the same surname, and the 3,000*l.* was only to be payable in case the man to whom the estate was conveyed married, and then not to the former owner, but, although by his direction, to third persons evidently relations. It was partly in the nature of a purchase, and partly a family transaction, and the learned judge appears to have come to a just conclusion, which the reversal of the original decree in *Winter v. Lord Anson* does not seem to disturb.

6. And where a purchaser borrowed part of the purchase money of a third person, which he paid to the seller, and all parties joined in a deed which stated the transaction, and by which the purchaser gave a security on the estate to the lender for the money advanced, it was held that, by the assent of the seller to this transaction, he lost his lien at least as against the mortgagee.⁽ⁿ⁾

7. And in the same case, it appeared that several persons

⁽ⁿ⁾ *Cood v. Pollard*, 9 Price, 544; 10 Price, 109, *Cood v. Cood*; [*Clower v. Rawlings*, 9 Sm. & M. 122.]

agreed to join with the purchaser in bonds to secure the residue of the purchase money, and the agreement was recited, and they were made parties to the deed executed upon the sale, although it is not stated in the report whether they entered into any covenants by the deed; it is not clear that the chief baron decided this further point, but he said there was this material difference in the facts between this case and those in *Mackreth v. Symmons*; (o) there the bond was taken by the original seller of the estate from the purchaser alone; here he took a bond with sureties. There seems to be but little doubt that the chief baron, if he did not decide that no lien existed, would have so decided if the question had been properly before him.

* 8. Where a trustee was the purchaser, and the conveyance recited that he had obtained payment of a sufficient part of the trust money to pay the purchase money, and the witnessing part stated the money as having been paid to the seller in full, the latter was held to have no lien for a portion unpaid, although he retained the deeds with a declaration by the trustee that he had borrowed that portion of the seller in order to enable him to complete the purchase, and that the deeds were deposited with the seller as a security. The sum advanced was considered as a loan. (p)

9. In *Elliot v. Edwards*, (q) the vendor assigned a leasehold estate to the purchaser, upon payment of part of the purchase money. The purchaser, and another person as his surety, covenanted by the assignment for payment of the residue of the purchase money; and in the assignment was contained a proviso, that the estate should not be assigned until all the money was duly paid, without the joint consent of the vendor and the surety. Lord Alvanley was of opinion that the vendor had an equitable lien. But in a later case, where a daughter conveyed her remainder in fee in an estate to her father, the tenant for life, who was to pay a mortgage on the estate, the consideration was expressed to be "the sum of 3,000*l.* advanced, or agreed to be advanced or secured to the daughter in contemplation of her intended marriage, upon the terms expressed in a bond bearing even date herewith." And the receipt indorsed was of "a bond for 3,000*l.*, being the

(o) *Infra*.

(q) 3 Bos. & Pul. 181.

(p) *Muir v. Jolly*, 26 Beav. 143.

full consideration within expressed." The condition of the bond provided an annuity of 100*l.* to the daughter and her husband, and the payment of 3,000*l.* in certain events, with a proviso, to avoid the payment of the 3,000*l.* if the father should by deed or will give property to that amount to the husband or wife, — it was held that there was no lien on the estate for the 3,000*l.* It was considered that this was not the case of a security, but a substitution for the price, which the vendor had agreed to accept, and that the lien for the purchase money was consequently discharged.^(r) And yet there was no doubt that the security was the very one referred to by the conveyance, and that no new arrangement was made in regard to the price subsequently to the conveyance; and there seems to be no reason why the modification of payment without any alteration in the security should take away the lien. Upon an appeal the decree was affirmed upon the grounds that the husband was content to accept the bond as the fortune of his wife, — that it was a sort of family arrangement, — that the receipt was for the bond and not for the 3,000*l.*, and the parties were bargaining for a security and not for a stipulated sum, and no question of lien arose, because the purchaser * had actually received the consideration, that is, she was in effect paid by the receipt of the bond.

10. It is immaterial that the seller had no intention to reserve such a lien,^(s) or even intended to rest satisfied with the personal security:^(t) in either case, the lien will be raised in his favor, if the security which he has accepted does not, from the nature of it, preclude the claim. But an actual agreement, although by parol, to accept the personal security as the only one, would discharge the lien,^(u) whilst a like agreement that the

(r) *Parrott v. Sweetland*, 3 My. & Ke. 655.

(s) *Mackreth v. Symmons*, 15 Ves. 329.

(t) *Winter v. Ld. Anson*, 1 Sim. & Stu. 438.

(u) 1 Sim. & Stu. 438, 445. [The presumption of a lien may be rebutted, though no security is taken, by satisfactory evidence that it was intended that the lien should not be relied on. *Clark v. Hunt*, 3 J. J. Marsh. 553; *Phillips v. Saunderson*, 1 Sm. & M. 462; *Redford v. Gibson*, 12 Leigh, 332; *Scott v. Orbinson*, 21 Ark. 202. The conduct of the vendor may be such as to show it to be his intention to give up the lien, or make it inequitable that he should insist upon it as against the vendee or third person, and in such cases, the vendor must rely on the personal security taken by him. *Thompson v. Dawson*, 3 Head (Tenn.), 384; *Redford v. Gibson*, 12 Leigh, 332, 343; *Fowler v. Rust*, 2 Marsh. 294; *Clark v. Hunt*, 3 J. J.

son, 1 Sm. & M. 462; *Redford v. Gibson*, 12 Leigh, 332; *Scott v. Orbinson*, 21 Ark. 202. The conduct of the vendor may be such as to show it to be his intention to give up the lien, or make it inequitable that he should insist upon it as against the vendee or third person, and in such cases, the vendor must rely on the personal security taken by him. *Thompson v. Dawson*, 3 Head (Tenn.), 384; *Redford v. Gibson*, 12 Leigh, 332, 343; *Fowler v. Rust*, 2 Marsh. 294; *Clark v. Hunt*, 3 J. J.

money shall be secured on the estate would be binding, although on the face of the deed money in part and a bill for the remainder are declared to be "in full satisfaction for the absolute purchase."*(x)*

11. A stipulation that the purchase money should be paid within two years *after a resale*, was held to discharge the vendor's lien.*(y)*

12. If a vendor take a distinct and independent security for the purchase money, his lien on the estate is gone; such a security is evidence that he did not trust to the estate as a pledge for his money; *(z)* as where he accepted some stock for the money,*(a)* with an agreement, that in case it did not within a limited time produce a sum named, the purchaser should make it up to that sum; or where a vendor accepted a mortgage of another estate for the purchase money, the obvious intention of burdening one estate being, that the other shall remain free and unincumbered; *(b)* so, even where the vendor takes a mortgage

Marsh. 553, 558; Phillips v. Saunderson, 1 Sm. & M. 462, 465; Brown v. Gilman, 4 Wheat. 255, 291; Clower v. Rawlings, 9 Sm. & M. 122; M'Cown v. Jones, 14 Texas, 682; Scott v. Orbinson, 21 Ark. 202.]

(x) See Frail v. Ellis, 16 Beav. 350.

(y) *Ex parte* Parkes, 1 Gly. & Ja. 228.

(z) 6 Ves. 483; 15 Ves. 348, 349; [Boynton v. Champlin, 42 Ill. 57; Gilman v. Brown, 1 Mason, 191; 4 Kent (11th ed.), 153; Palmer App. 1 Doug. 422; Tayloe v. Adams, Gilmer, 329; Brown v. Gilman, 4 Wheat. 255, 291; Cox v. Fenwick, 3 Bibb, 183. If the vendor does any act which manifests an intention to rely upon any security independent of the lien, he will be taken to have waived it. Buntin v. French, 16 N. H. 592; Coit v. Fougere, 36 Barb. 195; Hare v. Van Deusen, 32 Barb. 92; Dibble v. Mitchell, 15 Ind. 435; Parker v. Lowell, 24 Texas, 238; Griffin v. Blanchard, 17 Cal. 70; Phelps v. Conover, 25 Ill. 309; Selby v. Stanley, 4 Minn. 65; Carrico v. The Farmers' & Merchants' National Bank, 33 Md. 242.]

(a) Nairn v. Prowse, 6 Ves. 752; but see

Ld. Eldon's observations. [See Lagow v. Badollet, 1 Blackf. 416.]

(b) Nairn v. Prowse; but see 15 Ves. 341; 2 Bal. & Beat. 515; [Richardson v. Ridgely, 8 Gill & J. 87; White v. Dougherty, 1 Martin & Y. 309; Young v. Wood, 11 B. Mon. 123; Mattix v. Weand, 19 Ind. 151; Harris v. Harlan, 14 Ind. 104; Shelby v. Perrin, 18 Texas, 515; Camden v. Vail, 23 Cal. 633; Hadley v. Pickett, 25 Ind. 450; Mims v. Macon & Western Railroad Co. 3 Kelly, 333. "Perhaps," said Mr. Justice Redfield in Manly v. Slason, 21 Vt. 271, "it may be considered as now settled that the taking of security beyond that of the vendee, whether personal, or by way of mortgage upon the same or other real estate, or by pledge or mortgage of personal estate, either for the whole or part of the purchase money, will ordinarily be esteemed sufficient evidence of a waiver of the lien, although by no means conclusive. See Wilson v. Graham, 5 Munf. 297; Francis v. Hazlerigg, Hardin, 48; Williams v. Roberts, 5 Ohio, 35; Mayham v. Coombs, 14 Ohio, 428, 435; Boon v. Murphy, 6 Blackf. 273, 276; Kleiser v.

of the estate sold for only part of the purchase money.(c) And these appear to be well founded general rules; although Lord Eldon thought they might be liable to some exceptions.(d) Again, a bond, and a mortgage of *part of the estate*, have been held to exclude the lien over the rest of the estate.(e)

13. But taking a bond or note for the purchase money will not affect the vendor's lien;(f) and although this has been decided otherwise,(g) it is now a settled point.(h)

14. And bills or promissory notes especially are taken, not as a * security, but as a mode of payment;(i) and this holds even

Scott, 6 Dana, 136; *Blight v. Banks*, 6 Monroe, 199; *Carrico v. The Farmers' & Merchants' National Bank*, 33 Md. 242.]

(c) *Bond v. Kent*, 2 Ver. 281; 1 Sch. & Lef. 135. [Where the vendor takes a mortgage on the land sold for a part, or the whole, of the purchase money, he will be held to have waived his lien. *Little v. Brown*, 2 Leigh, 355; *Hadley v. Pickett*, 25 Ind. 450; *Brown v. Gilman*, 4 Wheat. 291; *Fish v. Howland*, 1 Paige, 30; *Phillips v. Saunderson*, 1 Sm. & M. 465; see *M'Clure v. Harris*, 12 B. Mon. 261. But it has been held in Ohio that the lien is not extinguished by a mortgage for the purchase money. *Boos v. Ewing*, 17 Ohio, 500; *Anketel v. Converse*, 17 Ohio St. 11. If the vendor takes the note of a third person as payment for part of the purchase money, this will not discharge the lien for the remainder. *Hallock v. Smith*, 3 Barb. 267. If a worthless note is fraudulently imposed upon the vendor he will not lose his lien. *Hallock v. Smith*, 3 Barb. 267; *Coit v. Fougere*, 36 Barb. 195; *Toby v. McAllister*, 9 Wis. 463.]

(d) 15 Ves. 341, 348, 349; see *Cowell v. Simpson*, 16 Ves. 278, 280.

(e) *Capper v. Spottiswoode*, Taml. 21.

(f) *Hearle v. Botellers*, Cary, 25; *Tardiff v. Scrughan*, 1 Bro. C. C. 422; *Harrison v. Southcote*, 2 Ves. 389; *Ex parte Latey*, 2 Mon. & Ay. 609; see 15 Ves. 338, 343; *Gibbons v. Baddale*, 2 Eq. Ca. Ab. 682, n. (b) to (D); *Ex parte Peake*, 1 Mad. 346; [4 Kent (11th ed.), 153; *Evans v. Goodlet*, 1 Blackf. 246; *Cox v.*

Fenwick, 3 Bibb, 183, 184, 185; *Honore v. Bakewell*, 6 B. Mon. 67; *Taylor v. Hunter*, 5 Humph. 569; *Baum v. Grigsby*, 21 Cal. 172; *Walker v. Sedgwick*, 8 Cal. 398; *White v. Williams*, 1 Paige, 502; *Clark v. Hunt*, 3 J. J. Marsh. 553; *Thorn-ton v. Knox*, 6 B. Mon. 74; *Aldridge v. Dunn*, 7 Blackf. 249, 250; *Ross v. Whitson*, 6 Yerger, 50; *Sheratz v. Nicodemus*, 7 Yerger, 9; *Pinchain v. Collard*, 13 Texas, 333; *Truebody v. Jacobson*, 2 Cal. 269; *Manly v. Slason*, 21 Vt. 271; *Tompkins v. Mitchell*, 2 Rand. 428; *Van Doren v. Todd*, 2 Green Ch. (N. J.) 397; *Coit v. Fougere*, 36 Barb. 195; *Toby v. McAllister*, 9 Wis. 463; *Mims v. Macon & Western R. R. Co.* 3 Kelly, 333, 343; *Hoggatt v. Wade*, 10 Sm. & M. 143; *Hallock v. Smith*, 2 Barb. 267; *Clower v. Rawlings*, 9 Sm. & M. 122; *Garson v. Green*, 1 John. Ch. 308, 309; *Fish v. Howland*, 1 Paige, 20; *Eskridge v. McClure*, 2 Yerger, 184; *Lagow v. Badollett*, 1 Blackf. 416. The same is true of every other instrument or security, involving merely the personal liability of the vendee. *Mims v. Macon & Western Railroad Co.* 3 Kelly, 333, 343; *Baum v. Grigsby*, 21 Cal. 172.]

(g) *Fawell v. Heelis*, Amb. 724; 1 Bro. C. C. 421, n.; 2 Dick. 485.

(h) *Blackburn v. Gregson*, 1 Cox, 90; 1 Bro. C. C. 420; *Tardiff v. Scrughan*, Ib. 423; 15 Ves. 336, 337; 6 Ves. 752.

(i) *Hughes v. Kearney*, 1 Sch. & Lef. 132; *Lynn v. Chaters*, 2 Ke. 521; *Teed v. Carruthers*, 2 Yo. & Col. C. C. 40. [See

where the purchase money is paid by bills drawn by the purchaser, and accepted by him and a third person.^(k) And it is not important that the note or bill has been negotiated.^(l)

15. There appears to be no reason why the same rule should not extend to a covenant for the purchase money,^(l) although, as we have seen, where the conveyance is in consideration of a covenant entered into by the deed itself, that *may* prevent a lien from arising.^(m)

16. And after much difference of opinion, it is settled that a

Beyland v. Sewell, 4 Bush (Ky.), 637; 4 Kent (11th ed.), 153.]

(k) *Grant v. Mills*, 2 Ves. & Bea. 306; 1 Sch. & Lef. 132, 136. [And although the bill or note be guaranteed. *Burrus v. Roulhac*, 2 Bush (Ky.), 39; *Magruder v. Peter*, 11 Gill & J. 217. But see *Boynton v. Champlin*, 42 Ill. 57, where it was held that, if a bill of exchange drawn by the purchaser upon a third person and accepted, is taken by the vendor as security for the purchase money, such independent security will operate as a waiver of the vendor's lien. And so it has been maintained in other cases, and it is the prevailing doctrine in the United States, whenever this lien is recognized at all, that, if the vendor take a negotiable note drawn by the purchaser and indorsed by a third person, or drawn by a third person and indorsed by the purchaser, or a bond or note with a third person as surety or indorser, the presumption of the lien is thereby repelled. *Gilman v. Brown*, 1 Mason, 191, 218, 219; *S. C.* 4 Wheat. 256, 291; *Conover v. Warren*, 1 Gilman, 498, 501; *Palmer App.* 1 Doug. 422; *Campbell v. Baldwin*, 2 Humph. 248; *Marshall v. Christmas*, 3 Humph. 616; *Burke v. Gray*, 6 How. (Miss.) 527; *Foster v. Trustees, &c.* 3 Ala. 302; *Fish v. Howland*, 1 Paige, 20; *Eskridge v. McClure*, 2 Yerger, 84; *Boon v. Murphy*, 6 Blackf. 272; *Williams v. Roberts*, 5 Ohio, 35; *Mayham v. Coombes*, 14 Ohio, 428; *Wilson v. Graham*, 5 Munf. 296; *Way v. Patty*, 1 Carter, 102; *Francis v. Hazlerigg*, Hardin, 48; *Burger v. Potter*, 32 Ill. 66; *Sears v.*

Smith, 2 Mich. 243; *Carrico v. The Farmers' & Merchants' Nat. Bank*, 33 Md. 242; *Porter v. Dubuque*, 20 Iowa, 440; *Conover v. Warren*, 1 Gilman, 498; *Bradford v. Marvin*, 2 Florida, 463; *Schwarz v. Stein*, 29 Md. 112. But the acceptance of collateral security is not a conclusive waiver of the lien; it may still be shown that the equitable lien was to be retained. *Campbell v. Baldwin*, 2 Humph. 248, 258; *Marshall v. Christmas*, 3 Humph. 616; *Mims v. Macon & Western Railroad Co.* 3 Kelly, 333, 342; 2 Story Eq. Jur. § 1226; *Kyle v. Tait*, 6 Grattan, 48; *Tiernan v. Thurman*, 14 B. Mon. 277; *Sears v. Smith*, 2 Mich. 243; *Daughaday v. Paine*, 6 Min. 443; *Manly v. Slason*, 21 Vt. 271; *Gilman v. Brown*, 1 Mason, 192; *M'Candlish v. Keen*, 13 Grattan, 615, 625; see *Coster v. Bank of Georgia*, 24 Ala. 37; *Grigsby v. Hair*, 25 Ala. 327; *Slack v. McLagan*, 15 Ill. 242; *Carrico v. The Farmers' & Merchants' Nat. Bank*, 33 Md. 242; *McGonigal v. Plummer*, 30 Md. 422; *Schwarz v. Stein*, 29 Md. 112.]

(l) *Ex parte Loaring*, 2 Ro. 79; *Comer v. Walkley*, Reg. lib. A, 1784, fol. 625; *Mackreth v. Symmons*, 15 Ves. 329; but it is otherwise at law upon a sale of goods, *Bunney v. Poyntz*, 1 Nev. & Man. 229. [And the vendor's lien is not extinguished by a renewal of the notes given for an unpaid balance of the purchase money with personal security before he has conveyed the land. *Lusk v. Hopper*, 3 Bush (Ky.), 179; *Mims v. Lockett*, 23 Geo. 237.]

(l) [4 Kent (11th ed.), 153.]

(m) *Supra*, pl. 4, 5, 9.

lien will be raised in the vendor's favor, although the estate is sold for an *annuity*, and a bond or note is taken for securing the payment of it.⁽ⁿ⁾(1) But if from the frame of the transaction

(n) *Tardiff v. Scrughan*, 1 Bro. C. C. 412; *Winter v. Ld. Anson*, 3 Russ. 488; 423; *Mackreth v. Symmons*, 15 Ves. 329; *Richardson v. M'Causland*, Beat. 457; *Clarke v. Royle*, 3 Sim. 502; 13 Sim. *Matthew v. Bowler*, 6 Hare, 110.

(1) This point was considered to have been decided otherwise by Lord Eldon in *Mackreth v. Symmons*. A. was indebted to B. upon bond, in which C. joined as a surety for A. A. had also granted annuities secured by bonds, in which C. had also joined as surety; a value was put upon the annuities, and it was agreed between A., the debtor and grantor, and C., his surety, that the latter should pay the debt and keep down the annuities, and give an indemnity against them, and that A. should pay to C. the amount of the debt, and the valuation of the annuities to be secured by a mortgage: so that they agreed to change situations, C. to be the principal and A. to be the surety. C. gave a bond to A. to indemnify him against the annuities, and A. executed a mortgage in fee to C. to secure the sums agreed upon; so that the estate was made a security to C. for the debts he had agreed to pay, and the value of the annuities, just as if he had paid them. Afterwards, A. sold the reversion in fee of his estate after his own life to C., at a price composed of the principal and interest secured by the mortgage; and the estate was conveyed by him to the use of himself for life, remainder to C. in fee. Shortly afterwards, A. and C. joined in a conveyance to a third party, to secure annuities to a large amount, and there was no mention of any intention that A. should have a lien. C. did not pay the debt, nor did he keep down the annuities. And the question was, whether there was a lien on the estate for the debt or annuities. Lord Eldon established the lien as to the debt, and seemed not to deny the authority of *Tardiff v. Scrughan*, but the applicability of that case to the case before him as regarded the annuities; but the point was not decided, 10 Price, 111, 112. There was great difficulty in the way of Lord Eldon's opinion; for he admitted that the intention was the same both as to the debt and the annuities. There seems to have been no real difficulty in regard to the sum for which the lien ought to have been awarded, for as between A. and C. the value was an agreed sum, *which formed part of the purchase money*; and the lien therefore would have been for that sum, although as a security only for the annuities unpaid. The nature of the subject, viz., an annuity, presents no more difficulty in raising a charge for it by lien than in securing it by an express charge. The apparent difficulty from a bond being taken for the annuities, and none for the debt, is explained by the circumstance that C., the purchaser, was expected to pay the debt at once according to his undertaking, whereas the annuities were necessarily a continuing incumbrance, and therefore a bond was taken against them; but a bond does not discharge the lien. The reversion was not a fitter security for the debt than for the value of the annuities; it was only available for either by a sale, but it was more likely if not sold to become available in possession for continuing incumbrances, like annuities, than for a present debt. When the bond was given, it is clear that the lien in effect existed, or, in other words, that the estate in the hands of C., as mortgagee, would have been bound to answer the annuities, or if A. paid them, C. could not recover the mortgage money. For the case was simply this: A. mortgaged to C. for a sum, the agreed value of the annuities, and C., who was to pay the annuities, gave a bond of indemnity. If the transaction had stopped there, and C. had not paid the annuities, he could not have recovered the value of them under his mortgage, for he had not paid

—for example, *first, a grant by the purchaser to the seller of the annuity, and then a conveyance of the estate by the seller and his mortgagee of the legal estate to the purchaser, in consideration of the annuity having been granted—it can be collected that the seller was to rely upon the vendor's covenant for his security, a lien will not be raised for it.(o) This has been carried further, and a simple contract to assign certain * shares

(o) *Buckland v. Pocknell*, 13 Sim. 406. [See *Earl of Jersey v. Briton Ferry Floating Dock Co.* L. R. 7 Eq. 409.]

the money, or the annuities, and therefore was not a mortgagee for the amount. Now, when the mortgage was turned into a purchase, the lien for the debt was held to remain, and why not for the value of the annuities? As a mortgagee, C. was a purchaser *pro tanto*, — was the lien to cease because he became wholly the purchaser? The consideration still remained unpaid, and no intention was expressed to alter the relation of the parties as to the security for the sums due, and yet, according to the opinion expressed, A. retained his lien for the debt only, but lost his lien or security for the value of the annuities. *Comer v. Walkley*, before quoted, appeared to the author to be an authority, that a sum of money left in the hands of a purchaser to indemnify him against an annuity, and which by deed he covenanted to pay interest upon, and when the annuity was at an end to pay the principal, was a lien on the estate, but he originally quoted the case only to prove the general rule. Lord Eldon, who supposed the author to have come to a conclusion different from his, said he had looked into the register's book for the case of *Comer v. Walkley*, and it did seem to him that the writer's inference was not the necessary inference arising from the circumstances of that case as he found it in the register's book, 15 Ves. 354, 355. In *Clarke v. Royle*, the vice chancellor said that it appeared to him that Lord Eldon, in *Mackreth v. Symmons*, expressly overruled the decision in *Tardiff v. Scrughan*. But the case before him was not similar to that case, for there was simply a bond given for the annuity, 3 Sim. 502. In a later case he observed, referring to his former observation, that he did not wish it to be understood to be his opinion that Lord Eldon overruled *Tardiff v. Scrughan* point blank, 13 Sim. 412. In *Winter v. Lord Anson*, Lord Lyndhurst observed, that it was said that was the case of an annuity, and *Mackreth v. Symmons* was cited, but the grounds of the judgment did not apply to the case before him. He might add, that even in the case of an annuity for lives, Lord Camden, in *Tardiff v. Scrughan*, was of opinion in favor of the lien. The foregoing observations are abridged from former editions of this work. To the authorities before quoted we may add *Richardson v. McCausland*, Beat. 457, decided by Lord Manners. A lady, entitled to a life interest in a house and land, conveyed it to her son in consideration of his paying the rent of another house for her, and supplying her with a sufficient quantity of hay and corn, and her lien for all was established, Lord Manners being of opinion, that Lord Eldon, in *Mackreth v. Symmons*, did not intend to reverse the judgment in *Tardiff v. Scrughan*, or to declare his decisive opinion against it, but merely to distinguish the two cases. And in *Matthew v. Bowler*, 6 Hare, 110, Sir James Wigram V. C. held that the lien existed upon a life estate in leaseholds assigned to a purchaser in consideration of a life annuity payable weekly. This note may save the reader some trouble, although the point is now at rest. [See *Earl of Jersey v. Briton Ferry Floating Dock Co.* L. R. 7 Eq. 409.]

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in property to the purchaser upon which and in consideration of such conveyance he was to pay a claim of 500*l.* and interest upon the property, and 25*l.* to the seller, and to grant to the seller an annuity for three lives and the survivor, *to be secured by bond*, was held to give to the seller no lien on the property for the annuity, partly upon the ground, that if the land were not discharged, it would be rendered almost unsaleable, but principally on the terms of the contract and upon the authority of the case of *Buckland v. Pocknell*.^(p) It will be observed, that the terms of the contract did not exclude the lien, and the case relied upon appears to be distinguishable. It has, however, been affirmed on appeal. It was considered that there is no general rule deducible from the cases, but that each case must depend upon its own particular circumstances. And it was impossible to suppose that a person intended to purchase an estate in such a mode as would make it absolutely inalienable for three lives. This sets everything again afloat. Of course, if a contrary intention can be collected from the contract, the lien cannot prevail, otherwise the general rule should prevail. In the case referred to, the lien would not have rendered the estate inalienable, but it could only be sold subject to the annuity if the lien prevailed. The annuity was the price of the estate — why should the estate not be a security for it? The money consideration would be secured by the lien. The purchaser chose to burden himself with an annuity for three lives, and of course he and all his assets would continue liable to it during the lives. There seems to have been no sufficient reason for denying the lien for it on the property, for which it was a substitution. Of course, although there might not be a lien, the purchaser could not be compelled to convey until a bond had been executed. In this case, the seller had died without executing a conveyance, and the purchaser had died without executing a bond, although he had paid the annuity. Having regard to the liability of all the assets of the purchaser, it would be found difficult to satisfy the contract by a mere bond without an appropriation of part of the assets to answer it.^(q)

17. If a vendor sell to several whom he knows to be trustees

^(p) *Dixon v. Gayfere*, 17 Beav. 421; 1 Jur. N. S. 1080, 21 Beav. 118, consider the case; *Ker v. Clobery*, *sup.* 197, 198. ^(q) 1 De G. & J. 655; 3 Jur. N. S. 1157.

and convey to them, and by the deed acknowledge the receipt of the money which is ready for him, but he, without the concurrence of the other trustees, allow part of it to remain in the hands of one of them until certain matters are cleared up, he will not have a lien on the estate for the money unpaid.(r)

18. Trustees of a power of sale allowing the tenant for life to sell and receive the purchase money and invest it in the purchase of * another estate in his own name, would have a lien on the latter estate for the trust money.(s)

19. A lien may exist for part of the consideration, although it fails as to the residue. This was Lord Eldon's opinion in *Mackreth v. Symmons*, where he decided in favor of the lien as to the debt assumed by the purchaser, but which he failed to pay, whilst he refused to extend it to the annuities, or the value of them, although the purchaser agreed to pay the former upon being allowed the amount in value as part of the purchase money, and failed to pay them.(t)

20. If part of the purchase money remain unpaid, and a promissory note be given by the purchaser to the seller for the amount, and it be agreed that the seller shall remain in possession as tenant at a yearly rent; although the seller become bankrupt, his assignee will not be permitted to recover at law on the note, but the purchaser will be allowed to set off the amount against the rent due.(u)

21. A seller having taken a bond for the purchase money, cannot sue at law upon the bond and in equity upon the lien at the same time; but if he fail in one remedy, he may resort to the other.(x) The lien is a burden, but not arising upon any express

(r) *White v. Wakefield*, 7 Sim. 401.

(s) *Price v. Blakemore*, 6 Beav. 507.

(t) 15 Ves. 329.

(u) *Hanford v. Moseley*, 3 Hare, 572.

(x) *Barker v. Smark*, 3 Beav. 64.

[Upon a bill in equity to enforce this lien for the purchase money, the court will order the land, or so much of it as may be necessary, to be sold for the discharge of the debt. *Mullikin v. Mullikin*, 1 Bland, 538, 541; *Wilson v. Davison*, 2 Rob. 385; *Wade v. Greenwood*, 2 Rob. 475; *M'Gee v. Beall*, 3 Litt. 190; *Oulton v. Mitchell*, 4 Bibb, 239; *Mims v. Macon & Western*

Railroad Co. 3 Kelly, 333. A bill in equity to enforce this lien must show that the plaintiff has exhausted his remedy at law against the personal estate, or must aver such facts as show that he cannot have full, complete, and adequate remedy at law; but a court of equity will not compel him to proceed at law against the particular land in question. *Eyler v. Crabbs*, 2 Md. 137; *Pratt v. Van Wyck*, 6 Gill & J. 495, 498; *Hall v. Maccubbin*, 6 Gill & J. 107; *Richardson v. Stillinger*, 12 Gill & J. 478; *Buttorf v. Conner*, 1 Blackf. 288; *Russell v. Todd*, 7 Blackf. 239; *Ro-*

trust, and therefore it may be barred by the statute of limitations.(y)

22. Where a security by bond or note is given for the purchase money, and it is intended that the vendor shall not have a lien on the estate for the money, a declaration to that effect should be inserted in the conveyance; which would effectually prevent equity from raising a lien upon the *presumed* intention of the parties.

23. It must be remarked, that although equity raises this lien in favor of a vendor, yet originally it was not extended to third persons; that is, where the vendor was satisfied out of the personal estate of the purchaser, in exclusion of a third person, that person could not resort to the equitable lien of the vendor on the estate, or, in other words, could not require the purchased estate and the personal estate to be marshalled;(z) but after much discussion it has been settled otherwise,(a)(1) and therefore a case

per *v. M'Cook*, 7 Ala. 319, 324. In some cases it has been held that the vendor may enforce his lien in equity without having obtained a judgment, or taken any steps whatever at law. *High v. Batte*, 10 Yerger, 186; *Richardson v. Baker*, 5 J. J. Marsh. 323; *Galloway v. Hamilton*, 1 Dana, 576; *Harden v. Miller*, G. M. Dudley, 120; *Russell v. Todd*, 7 Blackf. 239. If a part only of the purchase money has become due, and the vendor enforce his lien for that part, the lien is exhausted. *Codwise v. Taylor*, 4 Sneed (Tenn.), 346.

(y) *Toft v. Stephenson*, 7 Hare, 1. [If an action to enforce the collection of the purchase money is barred, the lien ceases to be available. *Borst v. Corey*, 15 N. Y. 505; *Sheratz v. Nicodemus*, 7 Yerger, 9; *Trotter v. Erwin*, 27 Miss. 772; *Addams*

v. Heffernan, 9 Watts, 530; *Alexander v. McMurray*, 8 Watts, 504; *Hanna v. Wilson*, 3 Grattan, 243. But in Maryland a different view has been taken of the nature of this lien, and it has there been held that the trust may be enforced though the debt may be barred by the statute of limitations, as in the case of a mortgage. *Moreton v. Harrison*, 1 Bland, 491; *Linggan v. Henderson*, 1 Bland, 236.]

(z) *Coppin v. Coppin*, Sel. C. C. 28; 2 P. Wms. 291; *Pollexfen v. Moore*, 2 Atk. 272; *Ellard v. Cooper*, 1 Ir. Ch. R. 376.

(a) *Austen v. Halsey*, 6 Ves. 475; *Cox's n.* 2 P. Wms. 295; *Trimmer v. Bayne*, 9 Ves. 209; 4 Russ. 339, n.; *Headley v. Roadhead*, Coop. 50; *Sproule v. Prior*, 8 Sim. 189.

(1) In some former editions an argument was introduced to prove that *Coppin v. Coppin* established the true rule. *Pollexfen v. Moore*, 2 Atk. 272, was corrected by the author from the registrar's book, which showed that the words in the decree, "so far as the personal estate of the said Thomas Moore shall be applied in payment of the said purchase money," were omitted in the printed report, 3 Atk. 273, n. 3, last edition, Reg. lib. B, 1745, fol. 283. The seller in that case had an equitable mortgage. *Lutkins v. Leigh*, For. 253; *Aldrich v. Cooper*, 8 Ves. 397; *Holdsworth v. Holdsworth*, Hil. 23 Geo. 3; *O'Neal v. Mead*, 1 P. Wms. 693; *Austen v. Halsey*, 6 Ves. 475; *Headley v. Roadhead*, Coop. 50, were also referred to. Lord Eldon, in *Austen v. Halsey*,

between an heir and legatees * was held not to be distinguishable from the common case of marshalling; that a person having resort to two funds shall not by his choice disappoint another having one only.(a¹) The modern cases have decided that the purchased estate and the personal estate will be marshalled where the estate *descends* in favor of simple contract creditors and also of legatees;(b) and where the estate is *devised* in favor of simple contract creditors,(c) but not of legatees.(d) And now the estate would, if not charged by the purchaser's will with his debts, be subject to his simple contract as well as his specialty debts.(e) And where there is a will, the estate would now in most cases pass by it, although it was made before the estate was purchased.(f)

24. In a case where a testator recited his contract for the purchase of an estate, and directed his executors to pay the purchase money, and devised the estate to one and gave legacies and annuities to others, and the personal estate was insufficient to pay both the purchase money and the legatees and annuitants — the devisee and the legatees and annuitants were all, it seems, treated as legatees, and a ratable contribution was decreed.(g) Where the estate is devised subject to the vendor's lien, the devisee will still be entitled, in like manner as before the new statute of wills, to the aid of the personal estate, and to the aid of a descended

(a¹) [1 Story Eq. Jur. §§ 499, 558, 559; *Cheeseborough v. Millard*, 1 John. Ch. 412, 413; *Stevens v. Cooper*, 1 John. Ch. 430; *King v. Baldwin*, 2 John. Ch. 554; *Dorr v. Shaw*, 4 John. Ch. 17; *Hayes v. Ward*, 4 John. Ch. 123; *Hawley v. Mancius*, 7 John. Ch. 174, 184; *Alston v. Munford*, 1 Brock. 267; *Evertson v. Booth*, 19 John. 486; *Iglehart v. Armiger*, 1 Bland, 519; *Schnebley v. Ragan*, 7 Gill & J. 120.]

(b) *Trimmer v. Bayne*, 9 Ves. 209; 4 Russ. 339, n.; *Sproule v. Prior*, 8 Sim. 189.

(c) *Selby v. Selby*, 4 Russ. 336. [Upon a

sale of the land for debts, after the purchaser's death, the purchase money is first to be paid out of the proceeds. *White v. Casanave*, 1 Harr. & J. 106.]

(d) *Wythe v. Henniker*, 2 My. & Ke. 635; see now and consider 17 & 18 Vict. c. 113, *sup.* ch. 5, s. 2, p. 194, which will no doubt lead to litigation; *Birds v. Askey*, 24 Beav. 618.

(e) 3 & 4 Will. 4, c. 104.

(f) 1 Vict. c. 26; *sup.* ch. 12, s. 1.

(g) *Headley v. Roadhead*, Coop. 50; 4 Russ. 340.

was misled by the inaccurate report of *Pollexfen v. Moore*, and was of opinion in favor of the marshalling, and Sir W. Grant decided the very point accordingly in *Trimmer v. Bayne*.

estate, but he cannot call upon other devised estates for a contribution.(h)

25. If the seller keep the title deeds and conveyance of the estate to the purchaser by agreement in his own custody, as a security for the purchase money unpaid, he will have an equitable mortgage on the estate.(i)

26. This equitable lien prevails against the purchaser and his heir, and all persons claiming under him with notice, although for valuable consideration.(k) But it of course would not pre-

(h) *Emuss v. Smith*, 2 De G. & Sm. 722; see 17 & 18 Vict. c. 113.

(i) *Pollexfen v. Moore*, 2 Atk. 272; *Lutkins v. Leigh*, For. 53; *Aldrich v. Cooper*, 8 Ves. 397; *Holdsworth v. Holdsworth*, Hil. 23 Geo. 3, app. from the Rolls; *O'Neal v. Mead*, 1 P. Wms. 693, & note; see *Wront v. Dawes*, 25 Beav. 369; *Smith v. Evans*, 28 Beav. 59; consider the judgment with reference to the facts.

(k) *Hearle v. Botellers*, Cary, 25; *Walker v. Preswick*, 2 Ves. 622; *Gibbons v. Baddall*, 2 Eq. Ca. Ab. 682, n. (b) to (D); *Elliott v. Edwards*, 3 Bos. & Pul. 181; *Mackreth v. Symmons*, 15 Ves. 329; *Winter v. Ld. Anson*, 3 Russ. 493; [1 Story Eq. Jur. §§ 788, 789; 4 Kent (11th ed.), 151-154; *Meigs v. Dimmock*, 6 Conn. 458; *Watson v. Wells*, 5 Conn. 468; *Stafford v. Van Rensselaer*, 9 Cowen, 316; *Marsh v. Turner*, 4 Missou. 253; *McKnight v. Bright*, 2 Missou. 110; *Mounce v. Byars*, 16 Geo. 469; *Deibler v. Barwick*, 4 Blackf. 339; *Marshall J. in Bayley v. Greenleaf*, 7 Wheat. 46; *Magruder v. Peter*, 11 Gill & J. 217; *High v. Batte*, 10 Yerger, 186; *Ross v. Whitson*, 6 Yerger, 50; *Tompkins v. Mitchell*, 2 Rand. 428, 429; *Cox v. Fenwick*, 3 Bibb, 183, 184; *Warner v. Van Alstyne*, 3 Paige, 513; *Burlingame v. Robbins*, 21 Barb. 327; *Hallock v. Smith*, 3 Barb. 267; *Thornton v. Knox*, 6 B. Mon. 74, 75; *Williams v. Roberts*, 5 Ohio, 35; *Neil v. Kinney*, 11 Ohio St. 58; *Dyer v. Martin*, 4 Scam. 148, 151; *Hull v. Click*, 5 Ala. 363, 364; *Stewart v. Ives*, 1 Sm. & M. 197,

206; *Upshaw v. Hargrave*, 6 Sm. & M. 286, 291; *Wilcox v. Calloway*, 1 Wash. 38; *Graves v. McCall*, 1 Call, 414; *Eskridge v. McClure*, 2 Yerger, 84; *Garson v. Green*, 1 John. Ch. 308; *Wade v. Greenwood*, 2 Rob. 475; *Ewbank v. Poston*, 5 Monroe, 285; *Redford v. Gibson*, 12 Leigh, 332; *Wright v. Woodland*, 10 Gill & J. 388; *McAlpin v. Burnett*, 19 Texas, 497; *Tiernan v. Thurman*, 14 B. Mon. 279; *Sheratz v. Nicodemus*, 7 Yerger, 9; *Grapengether v. Fejervary*, 9 Iowa, 163; *Pierson v. David*, 1 Clarke, 23; *Manly v. Slason*, 21 Vt. 271; *Haley v. Bennett*, 5 Porter, 452; *Mims v. Macon & Western Railroad*, 3 Kelly, 333; *Young v. Isett*, 1 Morris, 460; *Irvine v. Campbell*, 6 Binney, 118; *Amory v. Reilly*, 9 Ind. 490; *Pierce v. Gates*, 7 Blackf. 162; *Wiseman v. Hutchinson*, 20 Ind. 40; *Melross v. Scott*, 18 Ind. 250; *Merritt v. Wells*, 18 Ind. 171; *Thorn v. Wilson*, 27 Ind. 370; *McLaurie v. Thomas*, 39 Ill. 291. To the extent of the lien the purchaser becomes a trustee for the vendor; and his heirs, and all others claiming under him or them with notice, are treated as in the same predicament. 2 Story Eq. Jur. § 1217; 4 Kent (11th ed.), 152; *McLearn v. McLellan*, 10 Peters (U.S.), 640. This lien prevails against dower in the widow of the purchaser. *Warner v. Van Alstyne*, 3 Paige, 513; *Wilson v. Davison*, 2 Rob. 385; *Ellicott v. Welch*, 2 Bland, 243; *Crane v. Palmer*, 8 Blackf. 120; *Williams v. Wood*, 1 Humph. 408; *Besland v. Hewett*, 1 Sm. & M. 164; *Fisher v. Johnson*, 5 Ind. 492; *Nazereth &c. v. Lowe*,

vail against a *bonâ fide* purchaser without notice: (*k*¹) and the mere deduction of the title to the estate from the first vendor by recital, will not be sufficient to affect him, for that does not show it was not paid for; (*l*) which distinction does not appear to have been observed in the case of *Davies v. Thomas*, (*m*) but the authority of the case in this respect cannot, it should seem, be supported.

27. Where the seller, who had not been paid all the purchase money, although he had acknowledged the receipt of it in the body of the deed and by indorsement, was in possession of the estate as lessee to the equitable tenant for life under the settlement, for the uses of which the estate was purchased, annuitants under the equitable tenant for life were held not to be bound by the vendor's lien, in consequence of their attorney having had notice that the seller was in possession of the estate: for as the seller had declared by the conveyance that he had received all the money, (*1*) no man could be expected to inquire whether the pur-

1 B. Mon. 257. But see contrary in *Clements v. Bostwick*, 38 Geo. 1 (Harris J. dissenting). It prevails against a voluntary donee: *Upshaw v. Hargrave*, 6 Sm. & M. 286, 292.]

(*k*¹) [*Taylor v. Hunter*, 5 Humph. 569, 570; *Stewart v. Ives*, 1 Sm. & M. 197, 206; *Carnes v. Hubbard*, 2 Sm. & M. 108, 113; *Dunlap v. Burnett*, 5 Sm. & M. 702, 710; *Bayley v. Greenleaf*, 7 Wheat. 46, 50; *Aldridge v. Dunn*, 7 Blackf. 249; *Houston v. Stanton*, 11 Ala. 412; *Carter v. Bank of Georgia*, 24 Ala. 37; *Bradford v. Harper*, 25 Ala. 337; *Ewing v. Beauchamp*, 6 B. Mon. 422; *Wood v. Bank of Kentucky*, 5 Monroe, 194; *Blight v. Bank &c.* 6 Monroe, 192, 198; *Champion v. Brown*, 6 John. Ch. 402; *Scott v. Orbinson*, 21 Ark. 202; *Collier v. Harkness*, 26 Geo. 362; *Clark v. Hunt*, 3 J. J. Marsh. 553; *Duval v. Bibb*, 4 Hen. & M. 113; *Work v. Brayton*, 5 Ind. 396; *Selby v. Stanley*, 4 Miss. 65; *Boon v. Barnes*, 23 Miss. 136; *Schwarz v. Stein*, 29 Md. 112.]

(*l*) 1 Bro. C. C. 302; as to notice by *lis pendens*, see *Bellamy v. Sabine*, 1 De G. & J. 566, *infra*. [A recital in a deed, that the purchase money remains unpaid, is notice of the lien to a subsequent purchaser. *Honore v. Bakewell*, 6 B. Mon. 74; *Thornton v. Knox*, 6 B. Mon. 74; see *Woodward v. Woodward*, 7 B. Mon. 116; *Hoggatt v. Wade*, 10 Sm. & M. 143. And a subsequent purchaser will be affected with notice, if he might have learned the existence of the lien by examining the title deed of his vendor. *Honore v. Bakewell*, 6 B. Mon. 67. So where the vendor retains possession of the land sold, it has been held sufficient to put the subsequent purchaser from the vendee on inquiry as to whether the purchase money has been paid. *Hopkins v. Garrard*, 7 B. Mon. 312. Constructive notice is sufficient. *Tiernan v. Thurman*, 14 B. Mon. 277.]

(*m*) 2 Yo. & Col. 234; 4 Yo. & Col. 570.

(1) A receipt for the purchase money, although signed by the seller, is in equity of no avail if the money be not actually paid; *Coppin v. Coppin*, 2 P. Wms. 291; *Grif-*

chase money had been paid; (n) yet, where the purchase money not being paid the seller retained the conveyance and the title deeds, and a man took a mortgage from the purchaser without inquiring for the deeds, it was held that he was bound by constructive notice of the seller's lien for the unpaid purchase money.(o)

28. Persons coming in under the purchaser by act of law, as assignees of a bankrupt,(p) are bound by an equitable lien, although they had no notice of its existence.(q)

(n) *White v. Wakefield*, 7 Sim. 401.

(o) *Worthington v. Morgan*, 16 Sim. 547, *post*.

(p) *Blackburne v. Gregson*, 1 Bro. C. C. 420; *Bowles v. Rogers*, 6 Ves. 95, n.; *Ex parte Hanson*, 12 Ves. 346.

(q) *Mitford v. Mitford*, 9 Ves. 100; *Grant v. Mills*, 2 Ves. & Bea. 309; see the late statutes. [*Bayley v. Greenleaf*, 7 Wheat. 54; *Green v. Demoss*, 10 Humph. 371; 2 Story Eq. Jur. § 1228; *Mitchell v. Winslow*, 2 Story, 630; *Marine & Fire Ins. Bank v. Early*, R. M. Charl. 279; *Ligon v. Alexander*, 7 J. J. Marsh. 289. "This lien will also prevail," says Mr. Justice Story, "against assignees claiming by a general assignment under the bankrupt and insolvent laws; and against assignees claiming under a general assignment made by a failing debtor for the benefit of creditors; for in such cases the assignees are deemed to possess the same equities only as the debtor himself would possess. So it will prevail against a judgment creditor of the vendee before an actual conveyance of the estate has

been made to him." 2 Story Eq. Jur. § 1228, 4 Kent (11th ed.), 154. That this lien will prevail against a voluntary assignment for the benefit of creditors generally, see *Brown v. Vanlier*, 7 Humph. 239, 249; *Shirley v. Sugar Refinery*, 2 Edw. Ch. 505, 508; *Repp v. Repp*, 12 Gill & J. 341, 352; but see *Dunlap v. Burnett*, 5 Sm. & M. 702, 710. "But there is a clear distinction between the case of such a general assignment to assignees for the benefit of creditors generally, and a particular assignment to specified creditors for their particular security or satisfaction. The former are deemed to take as mere volunteers, and not as purchasers for a valuable consideration, strictly so called. The latter, if a conveyance of the property has actually been made and they have no notice of the purchase money being unpaid to the vendor, are deemed entitled to the same equities, as any other *bonâ fide* particular purchasers." 2 Story Eq. Jur. § 1229; *Mitford v. Mitford*, 9 Ves. jr. 400; *Bayley v. Greenleaf*, 7 Wheat. 56, 57; *Moore v. Holcombe*, 3

fin v. Clowes, 20 Beav. 61; nor even at law, for the receipt indorsed not being under seal, cannot amount to an estoppel; *Lampon v. Corke*, 5 Bar. & Ald. 606; *Henderson v. Wild*, 2 C. C. 561; but at law the receipt in the body of the deed is binding upon the parties; *Rowntree v. Jacob*, 2 Taunt. 141 (where there was also a receipt indorsed); whilst in equity it is no more binding against the truth of the transaction than the indorsement; *Croly v. Callaghan*, 5 Ir. E. R. 25; *Ex parte Morrell*, 22 L. T. 194; [*Gilman v. Brown*, 1 Mason, 192, 214; *Redford v. Gibson*, 12 Leigh, 332, 344; *Tribble v. Oldham*, 5 J. J. Marsh. 144; *Ewbank v. Poston*, 5 Monroe, 285, 287; *Sheratz v. Nicodemus*, 7 Yerger, 9; *Thornton v. Knox*, 6 B. Mon. 74, 76; 2 Story Eq. Jur. § 1225.] In equity payment will be presumed after a great length of time; *Bidlake v. Arundel*, 1 Ch. R. 93.

29. In some cases, by force of the seller's lien, the court can at once sell the estate and pay the purchase money to the seller.(r)

30. But where a brewhouse, plant and fixtures, were contracted to be sold, and the purchaser was let into possession, and there was a decree for a specific performance, but the purchaser became bankrupt before the money was paid, it was held that there was no lien *against the plant, which fell within the provision of the 21 Jac. 1, c. 19.(s)

31. And creditors claiming under a conveyance from the purchaser, are bound in like manner as assignees,(t) because they stand in the same situation as creditors under a commission.

32. Text writers generally quote the rule, that as between persons having only equitable interests *qui prior est tempore potior est jure*, and then show the exception. It has been said, that the following is the mode in which the rule should be stated with perfect accuracy: As between persons having only equitable interests, if their equities are *in all other respects* equal, priority of time gives the better equity, or *qui prior est tempore potior est jure*.(u)

33. An equitable mortgage by the purchaser, by deposit of deeds to a person, *bonâ fide*, and without notice, will give the latter a preferable equity, which will overreach the vendor's equitable lien on the estate for any part of the purchase money.(x)

Leigh, 597. As to mortgages, see *post*, 682, note. In North Carolina, before the doctrine of equitable lien for unpaid purchase money was entirely rejected in that State, it was held to be clear that this lien would not prevail against creditors of the vendee enforcing the collection of their debts, or purchasers under an execution sale. *Johnson v. Cawthorn*, 1 Dev. & Bat. Eq. 32; *Crawley v. Timberlake*, 1 Ired. Eq. 346; *Harper v. Williams*, 1 Dev. & Bat. Eq. 379. So it is settled in Tennessee. *Roberts v. Rose*, 2 Humph. 145, 147. But in Indiana the lien prevails against judgment creditors. *Aldridge v. Dunn*, 7 Blackf. 249, 250; see *Parker v. Kelly*, 10 Sm. & M. 184.]

(r) *Sup.*; as to the right to the lien, and also against the assets of a deceased pur-

chaser, see *Rome v. Young*, 3 Yo. & Col. 199.

(s) *Ex parte Dale*, 1 Buck, 365.

(t) *Fawell v. Heelis*, Amb. 724; 1 Bro. C. C. 302.

(u) 2 Drew. 78, 85, per Kindersley V. C.; see *Gibson v. Goldsmid*, 5 De G., M. & G. 757.

(x) *Nairne v. Prowse*, 6 Ves. 752; 2 Ves. & Bea. 149; *Stanhope v. Ld. Verney*, 2 Eden, 81; *Butler, n. Co. Litt.* 290 b; 2 Drew. 80; consider *Frere v. Moore*, 8 Price, 475. In *Mackreth v. Symmons*, 15 Ves. 329, there was no deposit of deeds. A mere deposit or charge gives a right to a sale, but not to a legal mortgage, and it has been held that a covenant to give a legal mortgage does not take away the right to a sale; *Matthews v. Goodday*, 8

This, which was before considered to be the law, has been so decided in the case of *Rice v. Rice*,^(y) where the purchaser had possession of the conveyance, with a regular receipt indorsed, and deposited it with the other deeds as a security.^(y¹)

34. In *Mackreth v. Symmons*, where the vendor had a lien,^(z) the legal fee was outstanding in a trustee to secure annuities, and a mortgagee (who had not originally looked to the security of the estate) claimed under a contract to make a mortgage to him, when he had no notice of the vendor's lien; and also under a regular mortgage of the equitable estate, when he had notice of the lien, but he had not a deposit of the deeds, and it was decided that as they were both equities, priorities must rank according to time, and consequently the mortgage be postponed to the lien. V. C. Kindersley has observed, that he had no doubt that in this case, if the equitable mortgagee had, in addition to his contract for a mortgage, obtained the title deeds from his mortgagor, Lord Eldon would have decided in his favor.^(a)

35. Where there was first, a mortgage without consideration and fraudulent, which was transferred to another person with notice, * which person deposited the deed with a creditor as a

Jur. N. S. 90; consider the case; see *Peto v. Hammond*, 29 Beav. 91. [Where equitable interests in an estate are otherwise equal, they will attach according to priority of time. *Berry v. Mutual Ins. Co.* 2 John. Ch. 603, 608; *Lynch v. Utica Ins. Co.* 18 Wend. 236.

^(y) 2 Drew. 73.

^(y¹) [See *Schwarz v. Stein*, 29 Md. 112. It seems to be agreed that this lien does not prevail against a *bonâ fide* mortgagee without notice, he being regarded in equity as a purchaser. *Duval v. Bibb*, 4 Hen. & M. 113, 120; 4 Kent (11th ed.), 153, 154; *Wood v. Bank of Kentucky*, 5 Monroe, 194, 195; *Clark v. Hunt*, 3 J. J. Marsh. 553, 557; 2 Story Eq. Jur. § 1229; *Growling v. Behn*, 10 B. Mon. 383. And it has been held that it will make no difference in this respect whether the mortgage, taken in good faith and without notice, is given for money advanced at the time, or for security of an antecedent debt. *Bayley v. Greenleaf*, 7 Wheat. 46; *Dunlap v.*

Burnett, 5 Sm. & M. 702; *Gann v. Chester*, 5 Yerger, 205; *Roberts v. Rose*, 2 Humph. 145; 2 Story Eq. Jur. § 1229; 4 Kent (11th ed.), 153, 154; *Roberts v. Salisbury*, 3 Gill & J. 425; *Breckenridge v. Todd*, 3 Monroe, 52, 55; *Hendricks v. Robinson*, 3 John. Ch. 282, 304, 306; *Moore v. Holcombe*, 3 Leigh, 597; *Webb v. Robinson*, 14 Geo. 216; *Johnson v. Cawthorn*, 1 Dev. & Bat. 32; *Harper v. Williams*, 1 Dev. & Bat. 379. Other cases maintain that in order to give a mortgage the preference it must be founded on some new consideration. See *Shirley v. Sugar Refinery*, 2 Ed. Ch. 511; *Repp v. Repp*, 12 Gill & J. 341; *Hallock v. Smith*, 3 Barb. 267; *Brown v. Vanlier*, 7 Humph. 239; *Ringgold v. Bryan*, 3 Md. Ch. 488; *Aldridge v. Dunn*, 7 Blackf. 249; 2 Cruise Dig. by Mr. Greenleaf, vol. 4, tit. 32, ch. 28, § 39, & note.]

^(z) 15 Ves. 329.

^(a) 2 Drew. 82; *Creed v. Carey*, 7 Ir. Ch. Rep. 295.

security, and the owner of the fee transferred his estate to a purchaser, the mortgage was ordered to be delivered up to him; for the person who took it in deposit would only take what his mortgagor could give him, and could not stand in a better situation. (b)

36. A deposit of title deeds by a simple contract debtor of the crown, for securing part of the purchase money for another estate, binds the crown as an equitable mortgage, although the purchaser also give his bond to the seller for the money. (c)

37. If the seller agree that the purchase money shall be paid to a third person, and the purchaser accordingly give a note to that person for the amount, the lien on the estate will, it seems, go with the note. (d)

38. The seller may of course assign the purchase money unpaid to another with his lien; (d¹) but although the assignee may

(b) *Parker v. Clarke*, 39 Beav. 54.

(c) *Casberd v. Ward*, 6 Price, 411; *Fecor v. Philpott*, 12 Price, 197.

(d) *Dryden v. Frost*, 3 My. & Cra. 670; where the third person was a prior mortgagee and attorney, and had the deeds in his possession. [See *Colcord v. Seamonds*, 6 B. Mon. 265. But a lien does not accrue to a third person who loans the purchase money to the purchaser and takes his note therefor. *Crane v. Caldwell*, 14 Ill. 468; *Skeggs v. Nelson*, 25 Miss. 88; *Stansell v. Roberts*, 13 Ohio, 148. A vendor, who has taken a note for the purchase money and passed it in exchange for another note, cannot resist a decree for the conveyance of the premises to a purchaser from the vendee, on the ground that the note taken by him for the purchase money has not been paid. *Day v. Preskett*, 40 Ala. 633.]

(d¹) [A conveyance, by the vendor of certain real estate, of all right therein, and an assignment "for value received" of all his right, title, and interest in and to the agreement for the sale of the same executed by him, operates to pass the vendor's lien; and the assignee may maintain a bill in equity against the vendee, to enforce the sale of the estate for the payment of the purchase money due on the agreement of sale. *Hooper v. Logan*, 23

Md. 201; see *High v. Childers*, 37 Geo. 221; *Blair v. Marsh*, 8 Clarke, 144; *Ross v. Heintzen*, 36 Cal. 313. An assignment of the bond, note, or other instrument, given for the purchase money, has been held in some States to carry the equitable lien on the land with it. See *Honore v. Bakewell*, 6 B. Mon. 67, 71, 72; *Brumfield v. Palmer*, 7 Blackf. 227; *Pierce v. Gates*, 7 Blackf. 162; *Parker v. Kelly*, 10 Sm. & M. 184; *Kenny v. Collins*, 4 Litt. 289; *Johnston v. Gwathmey*, 4 Litt. 317; *Eubank v. Poston*, 5 Monroe, 285, 287; *Edwards v. Bohannon*, 2 Dana, 98; *Lagow v. Badollet*, 1 Blackf. 417; *Roper v. McCook*, 7 Ala. 319; *White v. Stover*, 10 Ala. 441; *Grigsby v. Hair*, 25 Ala. 327; *Griffin v. Camaek*, 36 Ala. 695; *Murray v. Able*, 18 Texas, 515; *McAlpin v. Burnett*, 19 Texas, 497; *Moore v. Raymond*, 15 Texas, 554; *Fisher v. Johnson*, 5 Ind. 492; *Kern v. Hazlerigg*, 11 Ind. 443; *Rakestraw v. Hamilton*, 14 Iowa, 147; *Pierson v. David*, 1 Clarke, 23; *Mayo v. Cunningham*, 19 Grattan, 74. The contrary doctrine is, however, maintained by great weight of authority. *Jackman v. Hallock*, 1 Ohio, 318; *Tiernan v. Beam*, 2 Ohio, 383; *Brush v. Kinsley*, 14 Ohio; 20, 24; *Horton v. Horner*, 14 Ohio, 437; *Claiborne v. Crockett*, 3 Yerger, 27, 35; *Gann v. Chester*, 5 Yerger, 205; *Sheratz*

be a *bonâ fide* purchaser of the money, yet he will take, subject to the rights of the purchaser of the estate to have it cleared of incumbrances, and cannot better his condition by paying off a mortgage, for it is not a case for tacking.(e) If the seller after the contract and before a conveyance and payment of all the purchase money, being in possession of the deeds, deposit them with a person *bonâ fide* advancing money on them without notice of the contract, the latter will have an equitable mortgage binding on the purchaser after notice and before payment of the purchase money.(f)

39. If a purchaser deposit the deeds with a third person, as a collateral security for part of the purchase money, the seller, although he obtain possession of the conveyance to the purchaser from the depositary, and pledge it to persons who advance money upon it *bonâ fide*, cannot give them a lien beyond the amount of the purchase money actually unpaid to him.(g)

v. Nicodemus, 7 Yerger, 9, 13; *Green v. Demoss*, 10 Humph. 371; *Green v. Crockett*, 1 Dev. & Bat. Eq. 390, 392; *White v. Williams*, 1 Paige, 502; *Hallock v. Smith*, 3 Barb. 267; *Wellborn v. Williams*, 8 Geo. 258; *Webb v. Robinson*, 14 Geo. 216; *Walker v. Williams*, 30 Miss. 165; *Briggs v. Hill*, 6 How. (Miss.) 362, 364; *Moreton v. Harrison*, 1 Bland, 491; *Shall v. Biscoe*, 18 Ark. 142; *Iglehart v. Armiger*, 1 Bland, 519; *Schnebley v. Ragan*, 7 Gill & J. 120; *Hall v. Maccubbin*, 6 Gill & J. 107; *Hayden v. Stuart*, 4 Md. Ch. 280; *Dixon v. Dixon*, 1 Md. Ch. 220; *Watson v. Bane*, 7 Md. 117; *Baum v. Grigsby*, 21 Cal. 172; *Lewis v. Covillaud*, 21 Cal. 178; *Williams v. Young*, 21 Cal. 227; *Keith v. Horner*, 32 Ill. 524; *Richards v. Leaming*, 27 Ill. 431; *Briggs v. Planters' Bank*, 1 Freem. Ch. 574; *Dickinson v. Chase*, 1 Morris (Io.), 492. A surety for the purchase money, may, after he has paid it, claim to be subrogated to the vendor's rights respecting it. *Kleiser v. Scott*, 6 Dana, 137; *Burk v. Chrisman*, 3 B. Mon. 50; *Ghiselin v. Ferguson*, 4 Har. & J. 522; *Magruder v. Peter*, 11 Gill & J. 219; *Welch v. Parran*, 2 Gill, 320, 329; *Freeman v. Mebane*, 2 Jones Eq. 44; *Jordan v. Hudson*, 11

Texas, 82; *Schermerhorn v. Barhydt*, 9 Paige, 30, 43; *Kinney v. Harney*, 2 Leigh, 70; *Haffey v. Birchetts*, 11 Leigh, 83; *In re M'Gill*, 6 Barr, 504; *Eddy v. Traver*, 6 Paige, 521; see *Tompkins v. Mitchell*, 2 Rand. 428; *Melery v. Cooper*, 2 Bland, 199, note. It has been contended with great force of reason that the right to transfer a vendor's lien by assignment is involved in the principle of subrogation; and the inference has been drawn that where the assignment of the note or other security given for the purchase money carries with it the liability of the assignor, the lien remains; but where the assignment liberates the assignor from all responsibility in reference to the payment, the lien is lost, unless an intention to transfer the lien is sufficiently manifested either by acts or language. See 1 Lead. Cas. in Eq. (3d Am. ed.) 368, 369; *Grigsby v. Hair*, 25 Ala. 327; *Dixon v. Dixon*, 1 Md. Ch. 229; *Watson v. Bane*, 7 Md. 117; *Fisher v. Johnson*, 5 Ind. 492.]

(e) *Lacey v. Ingle*, 2 Phil. 413; *Dryden v. Frost*, 3 My. & Cra. 670, as to an assignment by parol.

(f) *Rayne v. Baker*, 1 Giff. 241.

(g) *Hooper v. Ramsbottom*, 4 Ca. 121;

40. Where a man sold and conveyed land to a building society, retaining an equitable mortgage on it for the purchase money which was not paid, it was held that he could not compel the payment of the money, in a suit against some of the persons who had bought lots from the company, but must make all the purchasers parties.^(h) Ultimately all the purchasers were made liable, for they and the purchasers from them were bound to inquire into the title. The seller retained possession of the deed of conveyance by him, and the * trustees agreed to execute a legal mortgage to him if required, and that in the mean time the seller should have an equitable charge on the estate. The purchasers had not asked for the production of the conveyance.⁽ⁱ⁾

41. The lien, as we have seen, may be barred by nonclaim.^(k) But, as we have also seen, whilst the principal remains unbarred the interest will run, and not be confined to six years. The principal would not become payable till the title was shown; that is the time for completion, and the right to receive interest accrues at the same time, although it is payable from the time of the contract.^(l)

42. The vendor's lien has been held not to be a security for money within a bequest of the securities for money of which the testator should die possessed.^(m)

6 Taunt. 12; *Harrington v. Price*, 3 B. & Ald. 170, *sup.*; see *Manningford v. Tolman*, 1 Col. 670.

^(h) *Peto v. Hammond*, 29 Beav. 91.

⁽ⁱ⁾ 8 Jur. N. S. 550.

^(k) *Sup.* ch. 12; *Toft v. Stephenson*, 7 Hare, 1; [*ante*, 679, & note.]

^(l) *Toft v. Stevenson*, 5 De G., M. & G. 735.

^(m) *Goold v. Teague*, 5 Jur. N. S. 116, which *qu.* and consider.

CHAPTER XX.

OF THE PERSONS INCAPABLE OF PURCHASING.

SECTION I.

OF PERSONS INCAPABLE OF PURCHASING.

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| <ol style="list-style-type: none">1. The several incapacities.2. Parishioners, &c. — Parson and churchwardens in London.3. Aliens purchase for benefit of crown. — Denizen may purchase and hold. — Office found. — Felons and traitors. — Corporations. | <ol style="list-style-type: none">4. Infants may at age waive a purchase. — Females covert : husband's dissent. — Contract to purchase by feme covert with separate estate. — Feme covert buying with husband's authority. — Lunatics. — Roman Catholics. |
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1. I. THIS incapacity is of three kinds : 1st, An absolute incapacity ; 2dly, An incapacity to hold, although an ability to purchase ; and 3dly, An incapacity to purchase, except *sub modo*.

2. The parishioners, or inhabitants of any place, or the churchwardens, are incapable of purchasing lands (a) by those names. But it seems that in London the parson and churchwardens are a corporation * to purchase lands. (b) And churchwardens and overseers are enabled by statute law, (c) to purchase a workhouse for the poor, but this is merely as trustees, and does not affect the general rule of law. And in many other cases powers for public purposes are given to purchase lands.

3. II. With respect to persons who are capable of purchasing, but incapable of holding : They are, 1. Aliens ; for although they may purchase, yet it can only be for the benefit of the king : and upon an office found, the king shall have it by his preroga-

(a) Co. Litt. 3 a.

(c) 9 Geo. 1, c. 7, s. 4.

(b) Warner's case, Cro. Jac. 532 ; Hargrave's n. (4) Co. Litt. 3 a.

tive.(d) And an alien cannot protect himself by taking the conveyance in the name of a trustee.(e) So a devise in trust for an alien will be enforced in favor of the crown.(f) But the interest of an alien under a devise to trustees to sell for the benefit of him and others, does not go to the crown.(g) If an alien be made a denizen by the king's letters patent, he is then capable of holding lands (h) purchased after his denization.(h¹) And if an alien purchased lands, and before office found the king make him a denizen by letters patent,(i) and confirm his estate, the confirmation will be good; as the land is not in the king till

(d) Co. Litt. 2 b; *Dumoncel v. Dumoncel*, 13 Ir. E. R. 92. [But now by the recent "naturalization act, 1870" (33 & 34 Vict. c. 14, s. 2), "real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner, in all respects, as through, from, or in succession to a natural born British subject." See 1 Dan. Ch. Pr. (4th Am. ed.) 47. By the Gen. Sts. of Mass. c. 90, § 38, aliens, whether resident or non-resident, may take, hold, transmit, and convey real estate, and no title to real estate shall be invalid on account of the alienage of any former owner. "These provisions were clearly intended to change the law as stated in *Foss v. Crisp*, 20 Pick. 121, 124." *Chapman C. J. in Lumb v. Jenkins*, 100 Mass. 527. The disability of aliens to take, hold, and transmit the title to real estate has been partially removed in some States, and wholly in some others. See 2 Kent (11th ed.), 53, 54; 1 Dan. Ch. Pr. (4th Am. ed.) 46, note (b), and cases cited; *Rouche v. Williamson*, 3 Ired. N. C. 146; *Duke of Richmond v. Miln*, 17 Louis. 312; *Chitty Contr.* (10 Am. ed.) 314, note (g); 1 *Cruise Dig.* by Mr. Greenleaf, tit. 1, § 39, in note. This matter is governed by the municipal law of the individual States. *Lynch v. Clarke*, 1

Sandf. Ch. 583; 2 Kent (11th ed.), 53, 54. See the points stated and cases cited in 1 Dan. Ch. Pr. (4th Am. ed.) 46, n. (b); *Chitty Contr.* (10th Am. ed.) 314, note (g). The statutes of several of the States and a synopsis of their provisions will be found in 1 *Cruise Dig.* by Mr. Greenleaf, tit. 1, § 39, in note, pp. 53, 54.]

(e) *The King v. Holland*, All. 14; Sty. 20, 40, 75, 84, 90, 94; 1 Ro. Ab. 194, pl. 8; [*Hubbard v. Goodwin*, 8 Leigh, 492; *Anstice v. Brown*, 6 Paige, 448.]

(f) *Barrow v. Wadkin*, 24 Beav. 1, disagreeing with *Rittson v. Stordy*, 3 Sm. & Gif. 230; [*Dumoncel v. Dumoncel*, 13 Ir. Eq. 92; *Burney v. Macdonald*, 15 Sim. 6; *Rittson v. Stordy*, 3 Sm. & M. 230; *Master v. De Croismar*, 11 Beav. 184.]

(g) *Du Hourmelin v. Sheldon*, 1 Beav. 79; 4 My. & Cra. 525.

(h) Co. Litt. 2 b; 7 & 8 Vict. c. 66, s. 6-11; s. 16 as to naturalization.

(h¹) [Before the statute removing the disability of alienage in reference to real estate in Massachusetts, aliens could not in that State take lands by descent, where the ancestor died after a preliminary declaration, but before actual naturalization; *Foss v. Crisp*, 20 Pick. 121; otherwise in Maine; and as to other States, see 1 *Cruise Dig.* by Mr. Greenleaf, tit. 1, § 39, note, pp. 53, 54.]

(i) See now for certificates of naturalization, 7 & 8 Vict. c. 66; and as to natural born subjects, see 21 & 22 Vict. c. 93, s. 2.

office found.(j) 2. Persons who have committed felony (k) or treason, or have been guilty of the offence of *præmunire*, and afterwards purchase lands, and then are attainted; for they have ability to purchase, although not to hold; and for that reason the lord of the fee shall have the lands; but if they purchase after they are attainted, they are then in the same situation with aliens, and the lands must go to the king.(l) 3. Corporations sole or aggregate, either ecclesiastical or temporal, cannot hold lands without authority of parliament or due license for that purpose; (m) and the lord of the fee, or in default thereof within the time limited by the statutes, the king may enter.(n)

4. III. With respect to persons capable of purchasing *sub modo*: They are, 1. Infants under the age of twenty-one years who may * purchase, and at their full age may bind themselves by agreeing to the purchase; or may waive the purchase without alleging any cause for so doing: and if they do not agree to the purchase after their full age, their heirs may waive the purchase in the same manner as the infants themselves could

(j) Goulds, 29, pl. 4; *Fourdrin v. Gowdey*, 3 My. & Ke. 383; *Du Hourmelin v. Sheldon*, 4 My. & Cra. 525; 7 & 8 Vict. c. 66, s. 5, as to leases to alien friends. [A grant of land by the state to an alien, his heirs and assigns, with warranty, enables the grantee's heirs, though aliens and in a foreign country, to inherit it. *Commonwealth v. Heirs of Andre*, 3 Pick. 224; *S. P. Jackson v. Goodale*, 20 John. 707.]

(k) See, as to felony, 55 Geo. 3, c. 145, *sup.* p. 460, n.; 3 & 4 W. 4, c. 106, s. 10, *sup.* p. 460; *Re Harrop's Est.* 3 Drew. 726; *In re Thompson's Trusts*, 22 Beav. 506; 24 & 25 Vict. c. 94.

(l) Co. Litt. 2 b; *Rex v. Inhab. of Had-denham*, 15 East, 463. [There is no forfeiture in the United States for felony; and in only a few States for treason. 2 Cruise Dig. by Mr. Greenleaf, vol. 3, tit.

30, § 11, note; *Ib.* tit. 29, ch. 2, § 21, note; 1 *Ib.* tit. 1, § 67, note; 2 Kent (11th ed.), 386.]

(m) Co. Litt. 99 a.

(n) Co. Litt. 2 b. [See 2 Kent (11th ed.), 282, 283, & notes; 1 Cruise Dig. tit. 1, § 40, note, p. 54; *Runyan v. Coster*, 14 Peters (U. S.), 122; *Sutton v. Cole*, 3 Pick. 232; *Jackson v. Hartwell*, 8 John. 422; *Angell & Ames Corp.* (9th ed.) § 148 *et seq.*; *State v. Comm'rs of Mansfield*, 3 N. J. 500; *State v. Newark*, 1 Dutcher, 315; *Riley v. Rochester*, 5 Seld. 64; *Miller v. Porter*, 53 Penn. St. 292; *Methodist Church v. Remington*, 1 Watts, 218; *Potter v. Thornton*, 7 R. I. 252; 2 Kent (11th ed.), 281, 283, & notes; *Phillips Academy v. King*, 12 Mass. 546; *Vidal v. Girard*, 2 How. (U. S.) 127; *Lathrop v. Bank of Scioto*, 8 Dana, 114.]

have done.(o)(1) 2. Females covert, who are capable of purchasing, but their husbands may disagree thereunto, and divest the whole estate, and maintain trover for the purchase money.(p) If a husband neither agree nor disagree, the purchase by his wife will be effectual ; (p¹) but after his death she may waive the pur-

(o) Ketsey's case, Cro. Jac. 320 ; 1 Ro. Ab. 731 (K) ; Co. Litt. 2 b ; Holmes v. Blogg, 8 Taunt. 508 ; 2 Mo. 552 ; Sugd. Pow. (8th ed.) 177. [Where an infant has purchased real estate or taken a lease of it upon the payment of rent, common justice seems to impose it upon him as a duty, when he becomes of age, to make his election, whether he will ratify or disaffirm the transaction, within a reasonable time. He cannot enjoy the estate for years after he becomes of age and then disaffirm the purchase and refuse to pay for it, or claim the consideration paid ; or thus enjoy the leased estate, and then avoid payment of the stipulated rent ; or receive rent on the lease granted, and then disaffirm the lease. When he will receive a benefit by silent acquiescence, he must make his election within a reasonable time, after he arrives at full age, or the benefits so received will be satisfactory evidence of a ratification. *Boody v. McKenney*, 23 Maine, 517, 524 ; *Hubbard v. Cummings*, 1 Greenl. 11 ; *Dana v. Coombs*, 6 Greenl. 89 ; *Barnaby v. Barnaby*, 1 Pick. 221 ; *Van Doren v. Everett*, 2 South. 460 ; *Belton v. Briggs*, 4 Desaus. 465 ; *Lawson v. Lovejoy*, 8 Greenl. 405, 407 ; *Kline v. Beebe*, 6 Conn. 494, 505, 506 ; *Robbins v. Eaton*, 10 N. H. 561 ; *Bigelow v. Kinney*, 3 Vt. 353 ; *Armfield v. Tate*, 7 Ired. 258 ; *Chitty Contr.* (10th Am. ed.) 171, & note ; *Cheshire v. Barrett*, 4 McCord, 241 ; *Kitchen v. Lee*, 11 Paige, 107 ; but see *Benham v. Bishop*, 9 Conn. 330. *Robbins v. Eaton*, *ubi supra*, was a case of purchase of land by an infant, who continued in possession, occupying and improving the same for some years after becoming of age,

and had offered to sell the land during that time, — this was held to be a ratification of the purchase. Where an infant purchases land, and at the same time conveys it in mortgage as security for the purchase money, if he ratifies the purchase after he comes of age, he thereby ratifies the mortgage. *Robbins v. Eaton*, 10 N. H. 561 ; *Dana v. Coombs*, 6 Greenl. 89 ; *Roberts v. Wiggin*, 1 N. H. 73 ; *Lynde v. Budd*, 2 Paige, 191 ; *Bigelow v. Kinney*, 3 Vt. 353 ; *Richardson v. Boright*, 9 Vt. 368 ; *Ottman v. Moak*, 3 Sandf. Ch. 431.] (p) *Garbrand v. Allen*, 1 Ld. Ray. 224 ; *Francis v. Wiggzell*, 1 Mad. 258.

(p¹) [See 2 Cruise Dig. by Mr. Greenleaf, vol. 4, tit. 32, ch. 27, § 7, & note. But a wife cannot by the common law be the immediate grantee of her husband. 2 Cruise Dig. by Mr. Greenleaf, vol. 4, tit. 32, ch. 2, § 33 ; *Stetson v. O'Sullivan*, 8 Allen, 322 ; *Martin v. Martin*, 1 Greenl. 394 ; *Shepard v. Shepard*, 7 John. Ch. 57, 60 ; *Thompson v. O'Sullivan*, 6 Allen, 304. Nor can the wife purchase her husband's equity of redemption at a sheriff's sale on execution. The officer merely conveys the husband's title, and can convey only to such persons as the husband himself could. *Stetson v. O'Sullivan*, 8 Allen, 21. But a conveyance by a husband to his wife may be upheld in equity. *Wallingford v. Allen*, 10 Peters (U. S.), 583 ; *Shepard v. Shepard*, 7 John. Ch. 57, 61 ; *Arundell v. Phipps*, 10 Ves. 139 ; 2 Kent (11th ed.), 162, 163, note. A husband cannot derive title to real estate from his wife, either through contract or lease. *Miller v. Long*, 99 Mass. 14 ; *Thompson v. O'Sullivan*, 6 Allen, 303.]

(1) For the liability of a person purchasing by mistake an infant's estate, consider *Bloomfield v. Eyre*, 8 Beav. 250.

chase, without giving any reason for so doing, although her husband may have agreed to it. And if, after her husband's death, she do not agree to it, her heirs may waive it.(q) If she have separate property, she may contract as if she were a feme sole for the purchase of an estate, and her separate property will be bound by the contract, although she do not refer to it; (r) and a feme covert may purchase lands pursuant to an authority given by her husband, and he cannot avoid it afterwards.(s) 3. Lunatics or idiots, who are capable of purchasing; but their purchases may be set aside by their committees, or, if they recover their senses, by themselves or by their heirs after their deaths.(t) If they recover their senses and agree thereunto, their heirs cannot set it aside. And where the insane state of mind was unknown to the other party, and no advantage was taken of the lunatic, the defence cannot prevail, especially where the parties cannot be restored to their original position.(u) As the king has the custody of idiots, upon an office found he may annul the purchase; (x) and after the lunatic is found so by inquisition, his committee may vacate the purchase.(y) 4. We need now only refer to the former disability of Roman Catholics.(z)

(q) Co. Litt. 3 a; *Barnfather v. Jordan*, Doug. 452.

(r) *Dowling v. Maguire*, Llo. & Goo. t. Plunk. 1; but see *Chester v. Platt*, *sup.* p. 206. [In the recent case of *Willard v. Eastham*, 15 Gray, 328, 335, it was determined that, where by a contract entered into by a married woman, the debt created by it is made expressly a charge on her separate estate, or is expressly contracted on its credit, or where the consideration goes to the benefit of such estate or to enhance its value, equity will decree that it shall be paid from such estate or its income, to the extent to which the power of disposal by the married woman may go. *Rogers v. Ward*, 8 Allen, 387. Payment may be enforced out of the separate estate of a married woman, so far as she has the right of disposal thereof, of a bond given by her for the price of land conveyed to

her sole and separate use. *Rogers v. Ward*, 8 Allen, 387. See *Picard v. Hine*, L. R. 5 Ch. App. 274, and decree in that case. *Johnson v. Gallagher*, 3 De G., F. & J. (Am. ed.) 494, note.]

(s) *Garbrand v. Allen*, *ubi sup.*; *Sugd. Pow.* (8th ed.) 174.

(t) Co. Litt. 2 b.

(u) *Molton v. Camroux*, 2 Ex. 487, 4 Ex. 17; *Beavan v. M'Donnell*, 10 Ex. 309; *Campbell v. Hooper*, 3 Sm. & Gif. 153; *Elliot v. Ince*, 7 De G., M. & G. 475, *sup.* p. 208; [*Price v. Berrington*, 3 Mac. & G. 486 (Am. ed.), notes, 497, note.]

(x) Co. Litt. 247 a.

(y) *Clerk v. Clerk*, 2 Ver. 412; *Addison v. Dawson*, 2 Ver. 678; *Ridler v. Ridler*; 1 Eq. Ca. Ab. 279.

(z) *Purch.* (11th ed.) 885.

* SECTION II.

OF PURCHASES BY TRUSTEES, AGENTS, ETC.

1. Trustees, &c., incapable of purchasing.
2. } Purchases by agents.
3. }
4. Agent buying his own estate for principal.
6. Execution creditor may buy.
7. So may mortgagee. — Unless a trustee of a power to sell.
8. Attorney cannot buy from client.
9. Resale by solicitor : mortgage, power of sale.
10. Arbitrator cannot buy claims.
11. Prohibition extends to buying as agent.
12. Although by auction or from the court.
13. Guardian and ward.
14. Relation of trustee purchasing.
15. Tenant for life purchasing under his power of sale.
16. Trustees relinquishing their office. — Trustee for creditors : majority of creditors.
17. Trustee may buy from *cestui que trust* when confidence at an end.
Authority from attorney to buy.
18. Attorney may buy from client at arm's length.
19. Trustee buying as agent.
20. How purchase to be effected where *cestui que trust* not *sui juris*.
21. Mortgagee relieved against purchase.
22. Estate not resold to be reconveyed.
23. Terms upon which purchase is set aside where estate is resold.
24. New sale.
25. In lots.
26. Rise in funds where money invested.
27. Allowance for repairs, &c. — Old buildings pulled down.
28. Rise in funds no objection to relief.
29. } Increased price, to be paid to *cestui que*
31. } *trust*.
30. Costs.
32. Purchasers with notice bound by the equity.
33. Acquiescence.
34. Laches : creditors. — Knowledge of *cestui que trust*.
35. Confirmation.

1. It may be laid down as a general proposition, that trustees (a) who have accepted the trusts, (b) unless they are nomi-

(a) *Fox v. Mackreth*, 2 Bro. C. C. 400 ; 4 Bro. P. C. by T. 258 ; *Hall v. Noyes*, 3 Bro. C. C. 483, 3 Ves. 748 ; *Killick v. Flexney*, 4 Bro. C. C. 161 ; *Whitcote v. Lawrence*, 3 Ves. 740 ; *Campbell v. Walker*, 5 Ves. 678 ; *Whitackre v. Whitackre*, Sel. C. C. 13 ; *Pike v. Vigers*, 2 Dru. & Wal. 262 ; consider *Hamilton v. Wright*, 9 Cl. & Fin. 111 ; *Sugd. H. of L.* 727 ; *Aberdeen Ry. Co. v. Blakie*, 1 Macq. 461 ; *Atty. Gen. v. Ld. Clarendon*, 17 Ves. 500, as to a governor of a charity. [In all cases where a purchase has been made, by a trustee on his own account, of the estate of his *cestui que trust*, although at public auction, it is in the option of the *cestui que trust* to set aside the sale, whether *bonâ fide* made or not. 1 Story Eq. Jur.

§ 322 ; *Lewin Trusts* (5th Eng. ed.), 359 *et seq.* ; *Davoue v. Fanning*, 2 John. Ch. 252, where the cases are fully examined and the subject thoroughly sifted ; *Rogers v. Rogers*, 1 Hopk. 515 ; *Van Horn v. Fonda*, 5 John. Ch. 388 ; 2 Kaimes Pr. Eq. 87 ; *De Caters v. Chaumont*, 3 Paige, 178 ; *Torrey v. Bank of Orleans*, 9 Paige, 650, 663 ; *Van Epps v. Van Epps*, 9 Paige, 238, 241 ; *Campbell v. Johnston*, 1 Sandf. Ch. 148 ; *Cram v. Mitchell*, 1 Sandf. Ch. 251, 256 ; *Case v. Abeel*, 1 Paige, 393 ; *Hawley v. Cramer*, 4 Cowen, 717 ; *De Bevoise v. Sandford*, 1 Hoff. 192 ; *Stuart v. Kissam*, 2 Barb. 493 ; *Saltmarsh v. Beene*, 4 Porter, 283 ; *Scroggins v. Mc-*

(b) *Stacey v. Elph*, 1 My. & Ke. 195.

nally such, as trustees to preserve contingent remainders,(c)

Dougald, 8 Ala. 382; Litchfield v. Cudworth, 15 Pick. 23, 31; Arnold v. Brown, 24 Pick. 96; Shelton v. Homer, 5 Met. 462, 467; Grider v. Payne, 9 Dana, 190; Haddix v. Haddix, 5 Litt. 202; Richardson v. Jones, 3 Gill & J. 163; Davis v. Simpson, 5 Harr. & J. 147; Brackenridge v. Holland, 2 Blackf. 377; Fonbl. Eq. bk. 2, ch. 7, § 7, note (r); 4 Kent (11th ed.), 438, and cases in notes; Perry v. Nixon, 4 Desaus. Eq. 504; Butler v. Haskell, 4 Desaus. 654; Boyd v. Hawkins, 2 Dev. Eq. 207; Wade v. Pettibone, 11 Ohio, 57; Johnson v. Blackman, 11 Conn. 343; Mills v. Goodsell, 5 Conn. 475; Wormley v. Wormley, 8 Wheat. 422, 441; Michoud v. Girod, 4 How. (U. S.) 503, 553; Leisenring v. Black, 5 Watts, 303; Bruch v. Lantz, 2 Rawle, 392; Moody v. Vandyke, 4 Binn. 31; Painter v. Henderson, 7 Barr, 48; Thorp v. McCullum, 1 Gilman, 615, 625; Clark v. Lee, 14 Iowa, 425; Zimmerman v. Harmon, 4 Rich. Eq. 165; Armstrong v. Campbell, 3 Yerger, 201; Thompson v. Wheatley, 5 Sm. & M. 499. A purchase from a co-trustee is equally objectionable. Hall v. Noyes, cited 3 Ves. jr. 748; S. C. 3 Bro. C. C. 483; Whichcote v. Lawrence, 3 Ves. jr. 740; Shelton v. Homer, 5 Met. 462, cited *post*, 688, note. The purchase is not absolutely void; it is voidable only at the election of the *cestui que trust*. Prevost v. Gratz, 1 Peters, C. C. 368; Harrington v. Brown, 5 Pick. 519; Hayward v. Ellis, 13 Pick. 272, 276; Jennison v. Hapgood, 7 Pick. 8; S. C. 10 Pick. 79, 111; Blood v. Hayman, 13 Met. 236, 237; Denn v. McKnight, 6 Halst. 585; Denn v. Wright, 2 Halst. 175; Thorp v. McCullum, 1 Gilman, 615, 627; Wilson v. Troup, 2 Cowen, 196; S. C. 7 John. Ch. 25; Bruch v. Lantz, 2 Rawle, 392; Musselman v. Eshelman, 10 Barr, 394; Bell v. Webb, 2 Gill, 164. One of several *cestuis que trust* may apply to have the sale set aside, though others are content with it. Davoue v. Fanning, 2 John.

Ch. 252, 268; Litchfield v. Cudworth, 15 Pick. 24, 31. The sale will not be set aside on the application of the trustee. Richardson v. Jones, 3 Gill & J. 164, 184; Jackson v. Vandalfsen, 5 John. 43, 48; A stranger cannot avoid it. Jackson v. Vandalfsen, 5 John. 43, 48; Jackson v. Walsh, 14 John. 407, 415; Wilson v. Troup, 2 Cowen, 196; S. C. 7 John. Ch. 25; Hawley v. Cramer, 4 Cowen, 717; Harrington v. Brown, 5 Pick. 521. Such a sale is capable of confirmation. Prevost v. Gratz, 1 Peters C. C. 368; Jackson v. Woolsey, 11 John. 446; Gallatin v. Cunningham, 8 Cowen, 361; Hayward v. Ellis, 13 Pick. 272; Houghton v. Hapgood, Grout v. Hapgood, 13 Pick. 154, 159; Jennison v. Hapgood, 14 Pick. 345; Ives v. Ashley, 97 Mass. 198, 204; Dunlap v. Mitchell, 10 Ohio, 117; Williams v. Marshall, 4 Gill & J. 377; Moore v. Hilton, 12 Leigh, 2; Scott v. Freeland, 7 Sm. & M. 410. The *cestui que trust* must pursue his remedy within a reasonable time. Hawley v. Cramer, 4 Cowen, 718; Prevost v. Gratz, 1 Peters C. C. 368; Phillips v. Belden, 2 Edw. Ch. 1, 27; Fish v. Miller, 1 Hoff. Ch. 287; Torrey v. Bank of Orleans, 9 Paige, 644; Jennison v. Hapgood, 7 Pick. 1, 8. If the *cestui que trust* deliberately confirms the sale, neither he nor any one claiming under him can afterwards object to it. Lazarus v. Bryson, 3 Binn. 54, 58; Painter v. Henderson, 7 Barr, 48, 50; Harrington v. Brown, 5 Pick. 519; Parker C. J. in Jennison v. Hapgood, 7 Pick. 8; Moore v. Hilton, 12 Leigh, 2, 28; Williams v. Marshall, 4 Gill & J. 377, 379; Field v. Arrowsmith, 3 Humph. 442, 446; Scott v. Freeland, 7 Sm. & M. 410, 417, 420. It seems that if the estate passes into the hands of a *bonâ fide* purchaser for a valuable consideration, the sale cannot be avoided by the *cestui que trust*. Blood v. Hayman, 13 Met. 231.]

(c) Parks v. White, 11 Ves. 226.

agents,(d) commissioners of bankrupts,(e) assignees of bankrupts,(f) or of insolvents (g) whilst the distinction remained, or their partners * in business,(h)(1) solicitors to the commission,(i)

(d) *York Build. Co. v. Mackenzie*, 8 Bro. P. C. 42; *Lowther v. Lowther*, 13 Ves. 95; *Watt v. Grove*, 2 Sch. & Lef. 492; *Whitcomb v. Minchin*, 5 Mad. 91; *Woodhouse v. Meredith*, 1 J. & W. 204; *In re Bloye's Trust*, 1 Mac. & G. 488; [*Armstrong v. Campbell*, 2 Yerger, 202, 236; *Hunt v. Bass*, 2 Dev. Eq. 292, 295; *Teakle v. Bailey*, 2 Brock. 44, 51; *Banks v. Judah*, 8 Conn. 146, 157; *Baker v. Whiting*, 3 Sumner, 476; *Phillips v. Belding*, 2 Edw. Ch. 15; *Reed v. Warner*, 5 Paige, 650; *Matthews v. Dragand*, 3 Des. 26; *Beal v. McKiernan*, 6 Miller (La.), 407. The rule applies to all purchases by a trustee or agent to sell, in which the trustee or agent is to be at all interested. *Armstrong v. Campbell*, 3 Yerger, 202, 236; *Hunt v. Bass*, 2 Dev. Eq. 292, 295. A sub-agent is just as much disqualified as an agent is, to make a purchase in opposition to the rights and interests of his principal. *Story J. in Baker v. Whiting*, 1 Story, 218, 241. If one who is employed as an agent to pay taxes on the lands of non-residents, suffer them to be sold for taxes and buy them himself, he is a trustee for the owners. *Oldhams v. Jones*, 5 B. Mon. 258, 467; see, also, *Baker v. Whiting*, 3 Sumner, 476.]

(e) *Ex parte Bennett*, 10 Ves. 381; *Ex parte Dumbell*, Aug. 13, 1806; *Mont. notes*, 33, cited; *Ex parte Harrison*, 1 Buck, 17; *Ex parte Baynton*, 7 Jur. 244.

(f) *Ex parte Reynolds*, 5 Ves. 707; *Ex parte Lacey*, 6 Ves. 625; *Ex parte Bage*, 4 Mad. 459; *Ex parte Badcock*, 1 Mon. & Mac. 231; *Ex parte Thwaites*, 1 Mon. & Ay. 323; *Ex parte Alexander*, 2 Mon. & Ay. 492; 7 Jur. 334, 9 Jur. 1085.

(g) *In re Browne*, 7 Ir. Ch. Rep. 275.

(h) *Ex parte Barnell*, 7 Jur. 116.

(i) *Owen v. Foulkes*, 6 Ves. 630, n. (b); *Sidny v. Ranger*, 12 Sim. 118; *Ex parte Linwood*; *Ex parte Churchill*, 8 Ves. 343; *Ex parte Bennett*, 10 Ves. 381; *Ex parte Dumbell*, 13 Aug. 1806; *Mon. n. 33*, cited; 12 Ves. 372; 3 Mer. 200; *Ex parte Town*, 2 Mon. & Ay. 29. [See *Harrison v. Mock*, 10 Ala. 185, 194; *Cram v. Mitchell*, 1 Sandf. Ch. 251, 256; *Ex parte Wiggins*, 1 Hill Ch. 353; *Wade v. Harper*, 3 Yerger, 383. In *Saltmarsh v. Beene*, 4 Porter, 383, the same rule was applied to a commissioner appointed by the orphans' court to sell lands, who was held incapable to buy directly or indirectly, in whole or in part.]

(1) Lord Eldon has said, that the rule is to be more peculiarly applied with unrelenting jealousy in the case of an assignee of a bankrupt; adding, that it must be understood, that whenever assignees purchase, they must expect an inquiry into the circumstances. See 6 Ves. 630, n. (b); 8 Ves. 346; 10 Ves. 395. And an assignee purchasing the estate himself, or permitting his co-assignee to purchase it, will be a sufficient cause of removal. *Ex parte Reynolds*, 5 Ves. 707.

If an assignee purchase an estate sold under the commission, and upon an accidental increase in the value of the property, he afterwards sells it at a considerable advance, he cannot, upon discovering that he ought not to have been a purchaser, pay the difference of the sales to the general fund of the creditors; *Ex parte Morgan*, 24 Feb. 1806; *Mon. n. 31*. And where upon the sale of a bankrupt's estate by auction, in two lots, both of the lots were bought in by the assignee, without the consent of the creditors, the lord chancellor, although there was a profit on the resale of one lot, which was more than equal to the loss on the resale of the other, so that the balance was in favor of the estate, held the assignee liable to make good the loss on the lot which was resold

auctioneers, (k) creditors who have been consulted as to the mode of sale, (l) counsel, (m) or any persons who, by being employed or concerned in the affairs of another, have acquired a knowledge of his property, are incapable of purchasing such property themselves, except under the restrictions which will shortly be mentioned. (m¹) For if persons having a confidential character

(k) *Barkett v. Cafe*, 4 De G. & Sm. 388; [*Veazie v. Williams*, 3 Story C. C. 611, 625; *Arnold v. Brown*, 24 Pick. 89; *Story Sales* (4th ed.), § 476, and cases cited. But a purchase by an auctioneer for himself is not void, but voidable only by his principal. The sale cannot be questioned by third persons; on the contrary, the principal may, if he chooses, upon notice of the fact, hold the auctioneer to his bid, as purchaser at the sale; and the auctioneer, when he purchases, does so at his own risk and peril. *Veazie v. Williams*, 3 Story C. C. 625.]

(l) *Ex parte Hughes*, 6 Ves. 617; *Coles v. Trecothick*, 9 Ves. 234; *Oliver v. Court*, 8 Price, 127; *Sugd. H. of L.* 721; 9 Jur. 1085.

(m) *Carter v. Palmer*, 1 Dru. & Wal. 722, 8 Cl. & Fin. 687, 705; *Nelson v. Booth*, 3 Jur. N. S. 457.

(m¹) [*Van Epps v. Van Epps*, 9 Paige, 238, 241; *Torrey v. Bank of Orleans*, 9 Paige, 650; S. C. 7 Hill, 260; *Rankin v. Porter*, 7 Watts, 387. Executors and administrators are within the rule; and a purchase of the trust estate by one or more executors or administrators, at their own sale, whether under a power in the will, or by an order of court, will be set aside upon an application of any of the heirs or creditors or other persons interested. *Davoue v. Fanning*, 2 John. Ch. 252; *Rogers v. Rogers*, 1 Hopk. 515;

Ward v. Smith, 3 Sandf. 592; *Ames v. Browning*, 1 Bradf. 321; *Michoud v. Girod*, 4 How. (U. S.) 504; *Arnold v. Brown*, 24 Pick. 86, 96; *Jennison v. Hapgood*, 7 Pick. 1; S. C. 10 Pick. 77; *Harrington v. Brown*, 5 Pick. 519, 521; *Litchfield v. Cudworth*, 15 Pick. 24; *Shelton v. Homer*, 5 Met. 462; *Blood v. Hayman*, 13 Met. 231; *Yeackel v. Litchfield*, 13 Allen, 417, 419; *Bostwick v. Atkins*, 1 Comst. 53; *Drysdale's Appeal*, 14 Penn. St. 531; *Moody v. Van Dyke*, 4 Binn. 31; *Painter v. Henderson*, 7 Barr, 48; *Beeson v. Beeson*, 9 Barr, 279; *Johnson v. Blackman*, 11 Conn. 343, 357; *Arrowsmith v. Van Harlingen*, Coxe, 26; *Obert v. Hanwell*, 3 Harrison, 74; *Davis v. Simpson*, 5 Harr. & J. 147; *Ryden v. Jones*, 1 Hawks, 497, 504; *Brackenridge v. Holland*, 2 Blackf. 377, 389; *Thorp v. McCullum*, 1 Gilman, 615; *Grider v. Payne*, 9 Dana, 188, 190; *Moore v. Hilton*, 12 Leigh, 2; *Bailey v. Robinson*, 1 Grattan, 4; 1 Story Eq. Jur. § 322; *Winter v. Geroe*, 1 Halst. Ch. 319; *Conway v. Green*, 1 Harr. & J. 151; *Hudson v. Hudson*, 5 Munf. 180; *Baines v. McGee*, 1 Sm. & M. 208; *Baxter v. Costin*, 1 Busb. Eq. 262; but see *Stallings v. Freeman*, 2 Hill Ch. 401, 409; *Britton v. Johnson*, 2 Hill Ch. 430, 434; *Brannan v. Oliver*, 2 Stew. 47; *Saltmarsh v. Beene*, 4 Porter, 283; *Julian v. Reynolds*, 8 Ala. 680; *Lovell v. Briggs*, 2 N. H. 218. The purchase by an agent of the administrator

at a less sum, without permitting him to set off the profit gained by the resale of the other lot, *Ex parte Lewis*, 1 Gly. & Ja. 69; *Ex parte Buxton*, *Id.* 355. An assignee, with the consent of his co-assignees, has been removed from his office in order to enable him to bid, when little competition was expected. *Ex parte Perkes*, 3 Mon. Dea., & De G. 385. A sale by a creditor under bankruptcy of his dividends to a third person, part of which purchase was privately for the assignee, was held wholly void; *Pooley v. Quilter*, 4 Drew. 184; 2 De G. & J. 327.

were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying on their integrity. The characters are inconsistent. *Emptor emit quam minimo potest, venditor vendit quam maximo potest.*^(m²)(1) Where the trustee buying is the trustee for sale,

for him, at an administrator's sale, falls within the same principle. *Buckles v. Lafferty*, 2 Rob. 294, 300; *Ives v. Ashley*, 97 Mass. 198, 204. The same rule applies where the purchase is made indirectly by a third person for the executor or administrator, the third person taking the title and afterwards transferring it to the executor or administrator. *Davoue v. Fanning*, 2 John. Ch. 252; *Paul v. Squibb*, 12 Penn. St. 296; *Woodruff v. Cook*, 2 Ed. Ch. 259; *Hawley v. Cramer*, 4 Cowen, 717; *Buckles v. Lafferty*, 2 Rob. 292; *Hunt v. Bass*, 2 Dev. Eq. 292. As to purchases by an executor or trustee from his co-executor or co-trustee, see *Case v. Abeel*, 1 Paige, 393; *Shelton v. Homer*, 5 Met. 467; *post*, 692, note. In regard to purchases by a trustee, for his own benefit, at a sale under an adverse proceeding, and at a judicial sale, see *Chapin v. Weed*, 1 Clarke Ch. 464; *Campbell v. Johnston*, 1 Sandf. Ch. 148; *M'Ginn v. Shaeffer*, 7 Watts, 412; *Callis v. Ridout*, 7 Gill & J. 2; *Bell v. Webb*, 2 Gill, 164; *Evertson v. Tappen*, 5 John. Ch. 498; *Torrey v. Bank of Orleans*, 9 Paige, 650; *S. C. 7 Hill*, 260; *Van Epps v. Van Epps*, 9 Paige, 238; *Prevost v. Gratz*, 1 Peters C. C. 365; *Fisk v. Sarber*, 6 W. & Serg. 18. The relation in which an attaching officer stands to the debtor, to the attaching creditor, and to other creditors, is not such as to render the officer incompetent to purchase the property attached, subject to the lien. *Arnold v.*

Brown, 24 Pick. 89. But there is no difference between a sheriff selling on execution and a common trustee, as to the right of either to purchase at his own sale. *Lazarus v. Bryson*, 3 Binn. 54; *Carter v. Harris*, 4 Rand. 199. As to the attorney in an execution buying the property sold under it; see *Howell v. Baker*, 4 John Ch. 118; *Leisening v. Black*, 5 Watts, 303; *Hawley v. Cramer*, 4 Cowen, 719. As to a purchase by an appraiser of property for an administrator's sale, see *Armstrong v. Huston*, 8 Ohio, 552. In the case of an administrator, who purchases an estate at his own sale, if the estate is afterwards sold and conveyed for a valuable and full consideration to a *bonâ fide* purchaser, who had no notice that it had been bought at the administrator's sale, for the administrator's benefit, such purchaser will hold it against the heirs of the intestate. *Blood v. Hayman*, 13 Met. 231. It would be otherwise if the purchaser had notice of the defect. *Blood v. Hayman*, 13 Met. 231. But an administrator is not a trustee of the real estate of his intestate for the heir, and as against the heir he may purchase for himself the real estate of his intestate at a judicial sale or foreclosure of a mortgage. *Johns v. Norris*, 7 C. E. Green (N. J.), 102; see *Lazarus v. Bryson*, 3 Binn. 59; *Ward v. Smith*, 3 Sandf. 592.]

(m²) [4 Kent (11th ed.), 438, & notes; *Fonbl. Eq. bk. 2, ch. 7, § 7, note (r)*; 1 *Story Eq. Jur. § 322 et seq.*]

(1) This principle has been attended to in the general inclosure act, which renders commissioners incapable of purchasing any estate in the parish in which the lands are intended to be inclosed, either in the names of themselves or others, until five years after the date and execution of the award, 41 Geo. 3, c. 109, s. 2; nor can valuers under the commons inclosure act, until after seven years after the confirmation of the

the purchase is absolutely void; where he is a mere trustee, he must show that the transaction was in all respects a fair one.(n)

* 2. So where a trustee or agent agrees to accept a benefit from an intended purchaser, the purchase cannot be maintained.(o) Again, if the agent make use of another person's name as the purchaser instead of his own, however fair the transaction, it has no validity in equity.(p)

3. Where even an agent was deemed capable of purchasing an estate in Ireland from his principal, but the seller was not aware that he was disposing of the only or principal turf bog on the estate, the sale was not enforced.(q)

4. So if an agent were to buy for his principal an estate vested in a third party, but who was secretly a trustee for the agent, the purchase would be set aside.(r)

(n) *Denton v. Donner*, 23 Beav. 285; *Smedley v. Varley*, 23 Beav. 358; [*Luff v. Lord*, 34 Beav. 220; and see *Franks v. Bollans*, L. R. 3 Ch. App. 717; *Pratt v. Thornton*, 28 Maine, 355; *McCartney v. Calhoun*, 17 Ala. 301; *Marshall v. Stevens*, 8 Humph. 159; *Beeson v. Beeson*, 9 Barr, 279; *Pennock's Appeal*, 4 Penn. St. 446; *Bruch v. Lantz*, 2 Rawle, 392; *Dobson v. Racey*, 3 Sandf. 61; *Paillon v. Martin*, 1 Sandf. 569; *Stuart v. Kissam*, 2 Barb. 494; *Monro v. Allaire*, 2 Caines Cas. 183; *Coles v. Trecothick*, 9 Ves. 246; *Campbell v. Walker*, 5 Ves. (Sumner's ed.) 678, n. (a); *Brackenridge v. Holland*, 2 Blackf. 377; *Braman v. Oliver*, 2 Stewart, 47; *Julian v. Reynolds*, 8 Ala. 680; *McKinley v. Irvine*, 14 Ala. 681; *Stallings v. Foreman*, 2 Hill Ch. 401; *Lyon v. Lyon*, 8 Ired. Eq. 201; *Harrington v. Brown*, 5 Pick. 519; *Jennison v. Hapgood*, 7 Pick. 1; *Dunlap v. Mitchell*, 10 Ohio, 117; *Field v. Arrowsmith*, 3 Humph. 442; *Scott v. Freeland*, 7 Sm. & M. 410; *Bryan v. Duncan*, 11 Geo. 67. The true meaning of the rule appears to be, that a trustee for sale may not unite in himself the character and perform the functions both of buyer and seller; or, in other words, purchase from himself instead of from his *cestui que trust*. When the purchase is from the *cestui que trust*, and the sale is not conducted, either directly or indirectly, by the trustee for sale, the transaction may stand; but in every dealing between *cestuis que trust* and their trustee, whether he is a trustee for sale or a mere ordinary trustee, the burden of proving the propriety of the transaction, and that no advantage was taken of the *cestuis que trust*, is thrown upon the trustee; and the relationship between them should be actually or virtually dissolved. 1 Dart V. & P. (4th Eng. ed.) 36.]

(o) *Bailey v. Watkins*, Sugd. H. of L. 726.

(p) *Ld. Hardwicke v. Vernon*, 4 Ves. 411; 14 Ves. 504; 2 Bro. C. C. 410, n.; *Murphy v. O'Shea*, 2 J. & L. 422; *Charter v. Trevelyan*, 11 Cl. & Fin. 714; Sugd. H. of L. 730; *In re Bloye's Trust*, 1 Mac. & G. 488; *Ex parte Gore*, 6 Jur. 1118, 7 Jur. 136; *Lewis v. Hillman*, 3 H. L. Cas. 607.

(q) *Chambers v. Betty*, Beat. 488.

(r) *Brookman v. Rothschild*, 3 Sim. 153; *Dow & Cl.* 188; Sugd. H. of L. 662; *Gillett v. Peppercorne*, 3 Beav. 78.

award, 8 & 9 Vict. c. 118, s. 219. As to a purchase by an agent of a landlord from a tenant, see *Smith v. Ward*, 1 Hay. & J. 705.

5. And to set aside the transaction it is not necessary that the trustee should have made any advantage of his purchase.(s)

6. A creditor having taken out execution may buy the estate sold under the execution.(t) Indeed this was never doubted where the transaction was a fair one.(u)

7. And the rule does not apply to a purchase by a mortgagee from the mortgagor.(v) But if a mortgagee take a conveyance with a power of sale, he is a trustee for sale, and as such disabled from purchasing.(x)

(s) *Ex parte Lacey*, 6 Ves. 626; *Hamilton v. Wright*, 9 Cl. & Fin. 124. [The principle applies, however innocent the purchase may be, in a given case. It is poisonous in its consequences. The *cestui que trust* is not bound to prove, nor is the court bound to decide, that the trustee has made a bargain advantageous to himself. It is to guard against uncertainty and hazard of abuse, and to remove the trustee from temptation, that the rule does and will permit the *cestui que trust* to come at his own option, and without showing essential injury, to insist upon the experiment of having another sale. 1 Story Eq. Jur. § 322; *Davoue v. Fanning*, 2 John. Ch. 252; *Shelton v. Homer*, 5 Met. 468; *Dobson v. Racey*, 3 Sandf. 61; *Rogers v. Rogers*, 1 Hopk. 515, 525; *Van Epps v. Van Epps*, 9 Paige, 238; *Torrey v. Bank of Orleans*, 9 Paige, 650; *Campbell v. Johnston*, 1 Sandf. 148; *Wade v. Harper*, 3 Yerger, 383, 385; *Scott v. Freeland*, 7 Sm. & M. 410; *Leisenring v. Black*, 5 Watts, 303; *Saltmarsh v. Beene*, 4 Porter, 283; *Baker v. Whiting*, 3 Sumner, 416; *Ex parte James*, 8 Ves. (Sumner's ed.) 337, & note; *Farnum v. Brooks*, 9 Pick. 212.]

(t) *Stratford v. Twynam*, Jac. 418.

(u) *Perens v. Johnson*, 3 Sm. & Gif. 419; a purchase by copartners under an execution for third party against the other partner. [See *Lyon v. James*, 6 Humph. 533; *Murdock's case*, 2 Bland, 461, 468.]

(v) *Webb v. Rorke*, 2 Sch. & Lef. 673; 1 Bal. & Beat. 164; *Ex parte Marsh*, 1

Mad. 148; *Chambers v. Waters*, 3 Sim. 42; *Waters v. Groom*, 11 Cl. & Fin. 684; *Willis v. Latham*, 1 Rep. t. Plun. 68, which case turned upon the letters; *Knight v. Marjoribanks*, 2 Mac. & G. 10. [*Iddings v. Bruen*, 4 Sandf. Ch. 223; *Murdock's case*, 2 Bland, 461; *Dobson v. Lord*, 8 Hare, 220. But if from the influence of his position he purchases at an undervalue, the sale may be set aside; *Ford v. Holden*, L. R. 3 Eq. 461; nor does the rule apply to a purchase by a second mortgagee selling under his power of sale; *Parkinson v. Hanbury*, 1 Dr. & Sm. 143; 2 De G., J. & S. 450; *Kirkwood v. Thompson*, 2 H. & M. 392; 2 De G., J. & S. 613; *Shaw v. Bunny*, 33 Beav. 494; 2 De G., J. & S. 468; even though the second mortgage may be in the form of a trust for sale; *Kirkwood v. Thompson*, *supra*; and so a trustee may purchase the equity of redemption in property on which he holds a mortgage as trustee. *Britton v. Lewis*, 8 Rich. Eq. 271.]

(x) *Downes v. Grazebrook*, 3 Mer. 200; *Ex parte Davis*, 1 Mon. & Ay. 89; 3 Jur. 19; *Waters v. Groom*, 11 Cl. & Fin. 684; see *Otter v. Ld. Vaux*, 2 K. & J. 650, 6 De G., M. & G. 638; [*In re Bloye's Trust*, 2 Mac. & G. 495, and cases in notes; *antè*, 65-68, in notes. If he makes a conveyance to a third person, and immediately takes a reconveyance to himself, though the value of the premises is not greater than the mortgage debt, the sale may be set aside. *Dobson v. Racey*, 3 Sandf. 61. Still a creditor or mortgagee,

8. The principle has, however, been extended to a purchase by an attorney from his client, while the relation subsists; (y) but where the solicitor was one of several judgment creditors, and there was a * sale by the sheriff, and the solicitor bought for himself, alleging that he had a right to attend the sale and to purchase, and that he was acting in the character of judgment creditor, it was considered that he had a right to throw off his character of solicitor at that particular time; (z) and where there has been delay and no conveyance executed, the seller, the client, may be left to his remedy at law, and yet a bill for specific performance by the attorney may be dismissed.(a) But although an attorney can show that he is entitled to purchase, yet if, instead of openly purchasing, he purchases in the name of a trustee or agent without disclosing the fact, no such purchase can stand,(b) nor can a conveyance for a small sum as on a purchase during the relation be sustained by evidence as a pure gift.(c) Of course, where there is no fraud, it is no objection that the

authorized to sell a security given to him for his debt, may, with the assent of his debtors, become the purchaser thereof, and of all the equitable or residuary interest of the debtor, for a fair and adequate valuation. And such purchase, if made *bonâ fide* and without intent to injure or defraud other creditors, will be valid not only against the debtor or *cestui que trust*, but against all other persons. Hendricks v. Robinson, 2 John. Ch. 283, 311.]

(y) *Bellew v. Russell*, 1 Bal. & Beat. 96; 9 Ves. 296; 13 Ves. 138 as to *gifts*, which cite the early cases; as to a barrister and agent, *Carter v. Palmer*, 1 Dru. & Wal. 722, *inf.*; see *Ld. Selsey v. Rhoades*, 2 Sim. & Stu. 41; *Williams v. Llewellyn*, 2 Yo. & Jer. 68; *Champion v. Rigby*, 1 Rus. & My. 539; *Jones v. Thomas*, 2 Yo. & Col. 498; *Casborne v. Barsham*, 2 Beav. 76; *Austin v. Chambers*, 6 Cl. & Fin. 1; *Ker v. Ld. Dunganon*, 1 Dru. & War. 542; *Lawless v. Mansfield*, *Ib.* 557; *Character v. Trevelyan*, 11 Cl. & Fin. 714; *King v. Savery*, 1 Sm. & Gif. 258, D. P. May, 1856; [S. C. 5 H. L. Cas. 627;] *Denton v. Donner*, 23 Beav. 285; *Lawrance v.*

Galsworthy, 3 Jur. N. S. 1049; *Lord Clarricarde v. Henning*, 7 Jur. N. S. 1113; *Stump v. Gaby*, 2 De G., M. & G. 623. [See *Cleavinger v. Reimar*, 3 Watts & S. 486; *Hockenburt v. Carlisle*, 5 Watts & S. 348; *Arnold v. Brown*, 24 Pick. 89, 96; *Arden v. Patterson*, 5 John. Ch. 49, 50; *Wendell v. Van Rensselaer*, 1 John. Ch. 344; *Hawley v. Cramer*, 4 Cowen, 718, 733 *et seq.*; 1 Story Eq. Jur. § 310 *et seq.*; *Newman v. Payne*, 2 Ves. (Sumner's ed.) 199, & note (a); *De Montmorency v. Devereux*, 7 Cl. & Fin. 188; *Holman v. Loynes*, 4 De G., M. & G. 270, & note (1); *Gresley v. Mousley*, 4 De G. & J. 78; *Lyddon v. Moss*, 4 De G. & J. 104; *Henry v. Raiman*, 25 Penn. St. 354; *West v. Raymond*, 21 Ind. 305; 1 Dart V. & P. (4th Eng. ed.) 32, 35.]

(z) *Austin v. Chambers*, 6 Cl. & Fin. 1.

(a) *Salmon v. Cutts*, *Cutts v. Salmon*, 4 De G. & Sm. 125, 130; 16 Jur. 623.

(b) *Lewis v. Killman*, 3 H. L. Cas. 680; *infra*, *Popham v. Exham*, 10 Ir. Ch. Rep. 440.

(c) *Tomson v. Judge*, 3 Drew. 306.

seller constitutes as his agent for sale his solicitor, who is also the solicitor of the man who purchases.(d) But it must appear that the principals were at arm's length, and it must be open and fair beyond question, and therefore in such a case principally, apparently, upon the circumstance that the solicitor, who was concerned for both the seller and the buyer, had not for some time after the contract, communicated the name of the latter to the former, the bill was dismissed with costs.(e)

9. In a case in which a solicitor had first a mortgage with a power of sale from his client, and then a conveyance from the client upon a sale out and out, and the solicitor resold the property, it was held under the circumstances that the sale to the solicitor could not be supported, nor could his resale, as the purchaser could not set up a defence of purchase without notice; it was further held that the second sale could not be supported as if made, which it was not, under the power of sale in the mortgage, and that although the solicitor was entitled to have his money secured as a mortgage, yet that a power of sale could not be implied.(f)

10. So a person chosen as an arbitrator cannot buy up the unascertained claims of any of the parties to the reference; it would corrupt the fountain, and contaminate the ward.(g)

11. Where a person cannot purchase the estate himself, he cannot buy it as agent for another,(h) and perhaps cannot even employ a third person to contract or bid for the estate on the

(d) *Hesse v. Briant*, 2 Jur. N. S. 922.

(e) S. C. upon appeal reversed, 6 De G., M. & G. 623; consider the case. [The burden is upon the attorney or solicitor purchasing of a client to show that the transaction is fair and free from all just ground of suspicion. *Newman v. Payne*, 2 Ves. jr. 199; *Edwards v. Meyrick*, 2 Hare, 60; *Wood v. Downes*, 18 Ves. 120; *Lewis v. Hillman*, 3 H. L. Cas. 607; *Salmon v. Cutts*, 4 De G. & Sm. 131; *King v. Savery*, 5 H. L. Cas. 627; *Holman v. Loynes*, 4 De G., M. & G. 270; *Robinson v. Briggs*, 1 Sm. & Gif. 184; *Greenfield's Estate*, 14 Penn. St. 489; *Wallis v. Loubat*, 2 Denio, 607; *Evans v. Ellis*, 5 Denio, 640; *Merrett v. Lambert*, 10 Paige, 357;

Howell v. Ransom, 11 Paige, 538; *Hawley v. Cramer*, 5 Cowen, 717; *Barry v. Whitney*, 3 Sandf. 696; *Mott v. Harrington*, 12 Vt. 199; *Miles v. Ervin*, 1 McCord Ch. 524; *Bank v. Tyrrell*, 10 H. L. Cas. 26; *Wall v. Cockerell*, 10 H. L. Cas. 229; *Brown v. Kennedy*, 33 Beav. 133; *Brock v. Barnes*, 40 Barb. 521; *O'Brien v. Lewis*, 4 Gif. 221; *Gresley v. Mousley*, 4 De G. & J. 78; *Smith v. Brotherline*, 62 Penn. St. 461.]

(f) *Pearson v. Benson*, 28 Beav. 598.

(g) *Blenperhasset v. Day*, 2 Bal. & Beat. 116; *Cane v. Ld. Allen*, 2 Dow. 289.

(h) 9 Ves. 248; *Ex parte Bennett*, 10 Ves. 381.

behalf of a stranger.(i) So if a party is disabled from purchasing, his solicitor * or agent employed in the transaction is equally disabled, although for his own benefit.(k)(1)

12. A purchase by a trustee, whether for adults or infants, cannot now be supported, although the estate be sold by public auction,(l) or by the court, under a decree for sale.(m) The

(i) *Ex parte Bennett*, *ubi sup.*; *sed qu.*

(k) See *Hesse v. Briant*, 2 Jur. N. S. 922, and *qu.* what Lord Eldon did say in *Ex parte Bennett*; *In re Bloye's Trust*, 1 Mac. & G. 488.

(l) *York Build. Co. v. Mackenzie*, 8 Bro. P. C. 42; *Whichcote v. Lawrence*, 3 Ves. 740; *Campbell v. Walker*, 5 Ves. 678; *Sanderson v. Walker*, 13 Ves. 601; *Ex parte James*, 8 Ves. 337; 10 Ves. 393; *Att. Gen. v. Ld. Dudley*, *Coo.* 146; *Ingle v. Richards*, 6 Jur. N. S. 1178; [Da-

voue v. Fanning, 2 John. Ch. 252; *Hubbard J. in Shelton v. Homer*, 5 Met. 467; *Hayward v. Ellis*, 13 Pick. 272; *Rogers v. Rogers*, 1 Hopk. 527; *Rham v. North*, 2 Yeates, 118; 1 Story Eq. Jur. § 322; see *Drayton v. Drayton*, 1 Desaus. 567; *Anderson v. Fox*, 2 Hen. & M. 245; *McKee v. Young*, 4 Hen. & M. 430; *Hudson v. Hudson*, 5 Munf. 180.]

(m) *Price v. Byrn*, 5 Ves. 681; *Cary v. Cary*, 2 Sch. & Lef. 173.

(1) In *Davidson v. Gardner*, Ch. 21, Feb. 1743, MS., see *Lambert v. Bainton*, 1 Ch. Ca. 199, Lord Hardwicke laid down the following rules as to a trustee purchasing of his *cestui que trust*. 1st. That in all cases of a trustee purchasing of the *cestui que trust*, the court will look upon it with a jealous eye. 2dly. It has been laid down as a general rule, that where a trustee for persons not *sui juris*, as infants and *femes covert*, becomes both buyer and seller, the court will under no circumstances whatever, be they never so fair between the parties (as consulting the friends of the infant, or of their refusing to purchase, or the like), establish a purchase of that kind, unless the transaction is legitimated by the act of the court, or some public act. And the reason is, because if such purchases were allowed they would be liable to very great abuses; and this is the reason why the court will not allow a trustee anything for his trouble. So, where a trustee renewed a lease in his own name, though it was proved that all the friends of the infant were consulted, and they refused to renew it, the court decreed it to be in trust for the infant, though not the least unfairness appeared; which was the case of *Rumford Market*, before Lord King. But if a bill is brought, and a sale ordered, and notice of the sale before the master, and the trustee purchases, the court has refused to set such sale aside, all the other circumstances being fair. So where there was a public sale of an estate by proclamation in the country; which was the case of *Saunders v. Burroughs*, before the present master of the rolls; but if that had been a private sale, though the consent of all the relations was had, and no unfairness appeared, I think such a sale should be set aside, at least not carried into execution. But it might be inconvenient to extend the rule so far as to prevent a trustee from purchasing of one who was *sui juris*, where no unfairness appeared. And in the principal case, which was of a mixed kind, the defendant who had purchased being a trustee for the plaintiff, who was a *feme covert*, and had the estate to her separate use, and therefore in a court of equity considered as a *feme sole*, and *sui juris*, as to the disposal of her estate; Lord Hardwicke dismissed the bill, which was brought to set aside the assignment she had made of her interest in a brewhouse to the defendant, it appearing that she had received a full value, and no particular instances of fraud being proved.

trustee may know not only the surface value, but that there are minerals.(n) So there may be a great many clandestine dealings, which may bring it to a price far short of that which would be produced if full information was given.(o) But of course the court has the power to allow a purchase by a trustee before the court, where it is greatly for the benefit of the estate.(p)

13. Lord Hardwicke said, that it was improper for a guardian to purchase his ward's estate immediately on his coming of age; but though it has a suspicious look, yet if he paid the full consideration, *it cannot be set aside. But it seems clear, that such a purchase would now be set aside on general principles, without reference to the adequacy of the consideration.(q)

14. It appears, however, that unless fraud can be proved, the circumstance of the purchaser being related to the trustee, agent, or other person having a confidential character, cannot even be opposed as a bar to the *aid* of the court *in favor of the purchaser*.(r)

15. We have before seen, that where a power is given by a settlement to trustees to sell the estate with the consent of the tenant for life, or to the tenant for life to sell with the consent of the trustees, the estate may be safely purchased by the tenant for life himself.(s) But where powers in a settlement to revoke the uses and appoint new ones were held to mean a settlement for the benefit of the parties under a settlement, a mortgage with a power of sale to one of the trustees whose consent to the sale was required was held not to be warranted by the power, and a purchaser was therefore not compelled to take the title.(t) And a bishop whose consent was required to a sale, was deemed incompetent to buy an annuity charged upon a rectory.(u)

(n) 10 Ves. 394.

(o) 8 Ves. 349.

(p) *Wren v. Kirton*, 8 Ves. 502; *Ex parte Molineux*, 2 Mon. & Ay. 245, as to assignees.

(q) *Oldin v. Sanborne*, 2 Atk. 15; *Dawson v. Massey*, 1 Bal. & Beat. 219. [*Haywood v. Ellis*, 13 Pick. 272; *Scott v. Freeland*, 7 Sm. & M. 410, 418; *Arnold v. Brown*, 24 Pick. 89, 96; 1 Story Eq. Jur. §§ 317-320.]

(r) *Prestage v. Langford*, 3 Wood. 248,

n.; *Coles v. Trecothick*, 9 Ves. 234; see *Ex parte Clark*, 2 De G., F. & J. 631; [*Oberlin College v. Fowler*, 10 Allen, 545; *Lamberton v. Smith*, 13 Serg. & R. 311.]

(s) 9 Ves. 52; 11 Ves. 410; but see *Ib.* 476, 477; *Howard v. Ducane*, Tur. & Rus. 81; *Grover v. Hugell*, 3 Russ. 428; *Beaden v. King*, 9 Hare, 499.

(t) *Eland v. Baker*, 19 Beav. 137, *qu.*, and consider the case, and *qu.* also the case put of an appointment by the husband and wife.

(u) *Greenlaw v. King*, 3 Beav. 49.

16. The court will not permit trustees or other prohibited persons in general to give up their office, and to bid, as it would lead to infinite mischief.^(u¹) The *cestuis que trust* themselves can decide this.^(x) And where creditors are entitled, it is doubtful whether the purchase can be supported unless *all* the creditors consent, although convenience, and the general rule of transactions by a body of persons, are strongly in favor of its validity where it is sanctioned by the great majority of the creditors.^(y)

17. It must not be understood that a trustee cannot buy from his *cestui que trust* where he is *sui juris*; the rule is, that he cannot buy from himself.^(z) If the *cestui que trust* clearly discharges the trustee from the trust, and considers him as an indifferent person, he may purchase; ^(a) but it must clearly appear, that the purchaser, at the time of the purchase, had shaken off his confidential character, by the consent of the *cestui que trust* freely given, after full information, and bargaining for the right to purchase.^(b) The attorney of the **cestui que trust* could not give

(u¹) [See *Shelton v. Homer*, 5 Met. 462.]

(x) *Ex parte James*, 8 Ves. 352.

(y) *Whelpdale v. Cookson*, 1 Ves. 9; 5 Ves. 682, n.; *contra*, 6 Ves. 628; see *Ex parte Bage*, 4 Mad. 459. [See *Davoue v. Fanning*, 2 John. Ch. 252, 268. In *Litchfield v. Cudworth*, 15 Pick. 23, it was decided that, where an administrator, selling the real estate of his intestate under a license, becomes himself the purchaser either directly or indirectly, the sale may be avoided or confirmed by the heirs or their assignees; and in so doing they are not bound to act jointly, but each has an individual right of election. "If," said Morton J., "the affirmation of the sale by some, and the avoidance of it by others, will produce great inconvenience in the final settlement of the estate, it will fall where it ought, upon the administrator, who has violated the trust and by his wrongful act caused the embarrassment." 15 Pick. 31.]

(z) 10 Ves. 246; *Ayliffe v. Murray*, 2

Atk. 58; *Crowe v. Ballard*, 3 Bro. C. C. 117; 1 Ves. jr. 215.

(a) 6 Ves. 627.

(b) 8 Ves. 353. [In *Ball v. Carew*, 13 Pick. 28, 31, 32, Mr. Justice Putnam said: "It would seem to impose an unnecessary hardship and disability upon him who had been a *cestui que trust*, to deprive him of the power of dealing with him who had been the trustee, but who had discharged himself, or been released from his duty as trustee. Such dealing would be good, if fair and honest." See *Morse v. Royal*, 12 Ves. 355; *Clarke v. Swaile*, 2 Eden, 134; *Davoue v. Fanning*, 2 John. Ch. 252; *Baker v. Whiting*, 3 Sumner, 483. A trustee, who has disclaimed without ever having acted in the trust, may become a purchaser. *Stacey v. Elph*, 1 My. & K. 195; *Chambers v. Waters*, 3 Sim. 42. But specific performance will not be decreed of a contract by an executor, under power of sale in the will of the testator, to sell to a person named as co-executor, although the person named as

validity to a sale to the trustee himself without a special authority.(c)

18. An attorney is not *incapable* of contracting with his client, but the relation must be dissolved, or the parties must take the character of purchaser and vendor; and all the duties of those characters must be performed.(c¹) If an attorney deal with his client without another attorney to advise with him as to the value, there will be thrown upon him the whole onus of the case.(d) And the attorney for the seller must be one *bonâ fide* selected and acting for him, and not nominally such.(e) And even a subsequent confirmation of the sale, and a gift of the property to the attorney by will has been considered to make the case worse.(f) A *secret* purchase of property by an attorney which is afterwards sold to his client by the person to whom it has been conveyed, whilst he acts as solicitor for his client the

co-executor had resigned his trust a few days before the contract of sale; such co-executor being one of the testator's heirs and devisees, and also, by the testator's will, a trustee for other heirs and devisees. *Shelton v. Homer*, 5 Met. 462. In this case Hubbard J. said: "Sitting as a court of equity, we cannot sustain, upon principles of sound policy, contracts of a character like the present. For although we have no reason to doubt that this individual transaction is fair in its motives, and beneficial perhaps to the other children of the testator, still to affirm it would sanction the principle, that an executor may bargain with his co-executor for the estate of the testator or a part of it, and then by the resignation of him who is to have the estate, a conveyance can be made to him by the other, and this in the exercise of a mere naked power, and in the present case, where, as a trustee, he is still in privity with the estate. And though conveyances to trustees may be examined in a court of equity and set aside as it regards heirs or *cestuis que trust*, still the conveyance would be voidable only in the first instance, and a title might perhaps be passed to strangers purchasing without notice." 5 Met. 468; see 1 Dart V. & P. (4th Eng. ed.) 37; *Carter v. Palmer*, 8 Cl.

& Fin. 657; *Spring v. Pride*, 12 W. R. 892.]

(c) 3 Mer. 209.

(c¹) [If the relation has been entirely dissolved, and there can be presumed to be no influence remaining, a valid purchase may be made by the attorney from his former client. *Wood v. Downes*, 18 Ves. 127. It is otherwise where the influence remains, although the relation has ceased. *Henry v. Raiman*, 25 Penn. St. 354; *Hockenburgh v. Carlisle*, 5 Watts & S. 350; *Leisenring v. Black*, 5 Watts, 303.]

(d) *Gibson v. Jeyes*, 6 Ves. 266; pp. 277, 278; *Wood v. Downes*, 18 Ves. 120; *Montesquieu v. Sandys*, *ib.* 302; *Bulkley v. Wilford*, 2 Cl. & Fin. 102; *Molony v. L'Estrange*, Beat. 406; *Edwards v. Meyrick*, 2 Hare, 60, 11 Jur. 80; *Langley v. Fisher*, 9 Beav. 102; *Ward v. Hartpole*, 3 Bli. N. S. 470; *Holman v. Loynes*, 4 De G., M. & G. 270, 2 Eq. R. 715; *Spencer v. Topham*, 22 Beav. 573; *Savery v. King*, 5 H. L. Cas. 627; *Bellamy v. Sabine*, 2 Phil. 425; 1 De G. & J. 535; *Simpson v. Lamb*, 28 L. T. 245; *Johnson v. Fesemeyer* or *Fesemeyer*, 25 Beav. 88, 3 De G. & J. 13; [*Gresley v. Mousley*, 3 De G., F. & J. 433; 4 De G. & J. 78; 1 Dart V. & P. (4th Eng. ed.) 33.]

(e) *Low v. Holmes*, 8 Ir. Ch. Rep. 53.

(f) *Waters v. Thorn*, 22 Beav. 547.

purchaser, and from which he derives a profit, cannot be supported.(g) So if an attorney be employed as agent in the management of a landed estate, he cannot deal with his principal for that estate without honestly communicating to the principal all the knowledge respecting its value which he had acquired as his agent.(h) And it lies upon the attorney to show the payment of the consideration beyond the acknowledgment in the deed, and the receipt indorsed upon it.(i)

19. The same circumstances that will authorize a trustee to contract for himself will enable him to purchase as the agent of another.(k)

20. A trustee for a person not *sui juris* can only buy the estate under the authority of the court. Lord Alvanley said there are cases in which the court would permit it; as if only 500*l.* was offered, and the trustee will give 1,000*l.*(l)

21. The remedy of the *cestui que trust*, where his trustee has purchased the trust estate contrary to the rules of the court, goes to the same persons who were entitled to the estate before the sale. Therefore *a legal or equitable mortgagee on the estate, who was not satisfied by the purchase money, may pursue the remedy against the trustee. And the circumstance of the mortgagee having been present at the sale, where he bid for the estate, is no objection to his claim against the owner of the estate, where the latter has set aside the sale, and derived any advantage from it.(m)

22. If the trustee has not sold the estate, the *cestui que trust* may insist on the purchase being avoided, and may reclaim his estate; (n) for it need not be shown that the trustee has made an advantage.(o)

(g) *Bank of London v. Tyrrell*, 27 Beav. 273, H. L. Cas. not yet reported.

(h) *Cane v. Ld. Allen*, 2 Dow, 89.

(i) *Gresley v. Mousley*, 1 Giff. 451; 4 De G. & J. 78; 8 Jur. N. S. 320; observe the mortgage of another estate to the attorney three days after the conveyance; *Anderson v. Radcliffe*, 1 El., Bl. & El. 806, 819.

(k) 9 Ves. 248.

(l) *Campbell v. Walker*, 5 Ves. 678; 13 Ves. 601; 1 Bal. & Beat. 418. [See

Davoue v. Fanning, 2 John. Ch. 252, 261, 262; *Breckenridge v. Holland*, 2 Blackf. 377, 381; *Dobson v. Racey*, 3 Sandf. 61; *De Caters v. De Chaumont*, 3 Paige, 178.]

(m) *Ex parte Lacey*, 6 Ves. 625; 12 Ves. 8; *Ex parte Morgan*, 12 Ves. 6.

(n) See 6 Ves. 627; *York B. Co. v. Mackenzie*, 8 Bro. P. C. 42; *Ld. Hardwicke v. Vernon*, 4 Ves. 411; *Randall v. Errington*, 10 Ves. 423; [*Parker C. J.* in

(o) 8 Ves. 348; 10 Ves. 385, 393.

23. If the *cestui que trust* require a reconveyance of the estate, he must repay to the trustee the original price of the estate,^(o¹) and also all sums laid out for permanent benefit and improvement of the estate, and interest thereon from the times they were actually disbursed; ^(o²) and the trustee must pay and allow all the rents received by him, and the yearly value of such parts as have been in his own occupation, and all sums received by the sale of timber or other parts of the inheritance, and interest thereon, from the times of their being received. In the *York Buildings Co. v. Mackenzie*, in the Lords,^(p) the House allowed the purchaser the value of improvements of all kinds, even in the instance of a mansion-house erected, and plantations of shrubs, &c.^(q) If the decree direct a reconveyance independently of anything else, the purchaser must reconvey, although the account of what is due to him for the purchase money has not been taken.^(r)

24. Where the *cestui que trust* is not desirous to take back the estate, he may require it to be put up to sale again at the price at which it was bought by the trustee: and that if any one bid more, the trustee shall not have the estate; but if not, that he may be compelled to keep it.^(s)

Jennison v. Hapgood, 7 Pick. 1, 8; *Litchfield v. Cudworth*, 15 Pick. 23, 31. So a reconveyance may be had from a person who has purchased from the trustee with notice. *Att. Gen. v. Lord Dudley, Cooper*, 146; *Dunbar v. Tredennick*, 2 Bal. & Beat. 304; *Ward v. Smith*, 3 Sandf. 592, 596; *Blood v. Hayman*, 13 Met. 231.]

^(o¹) [In the absence of actual fraud, a purchase by an administrator at a sale by him of his intestate's estate, will not be set aside in a suit at law by the devisees of the deceased, without repayment of the money advanced by him; but the remedy is in equity. *Yeackel v. Litchfield*, 13 Allen, 417; *Harrington v. Brown*, 5 Pick. 521.]

^(o²) [*Pratt v. Thornton*, 38 Maine, 355.]

^(p) 8 Bro. P. C. 42; *Trevelyan v. White*, 1 Beav. 588.

^(q) 6 Ves. 624. This must have been decided in some of the subsequent ap-

peals; 8 Bro. P. C. 71, n.; *Ex parte Hughes*, 6 Ves. 617; *Ex parte Bennett*, 10 Ves. 381; *Williamson v. Seaber*, 3 Yo. & Col. 717; as to a colorable purchase, see *Wilkinson v. Fowkes*, 9 Hare, 592. [See *Scott v. Freeland*, 7 Sm. & M. 410; *Campbell v. Johnston*, 1 Sandf. 148, 152; *Hawley v. Cramer*, 4 Cowen, 744.]

^(r) *Trevelyan v. Charter*, 9 Beav. 40.

^(s) *Ex parte Reynolds*, 5 Ves. 707; *Ex parte Hughes*; *Ex parte Lacey*; *Lister v. Lister*, 6 Ves. 617, 625, 631; *Ex parte Hewitt*, 2 Mon. & Ay. 477. [Before making such a resale, the court will direct an account to be taken of the various items, named above, as to be allowed on a reconveyance, and the balance with commissions and charges of resale will be the price at which the land is to be set up on the resale. See *Buckles v. Lafferty*, 2 Rob. 294, 301; *Bailey v. Robinson*, 1 Grattan, 4, 9; *Hawley v. Cramer*, 4 Cowen, 717, 738, 744;

25. If, however, the *cestui que trust* be desirous to have the estate put up in lots, and it was bought by the trustee in one lot, he must repay the trustee the purchase money with such interest as he would have been liable to pay upon his bargain, he accounting for the rents * received, or paying an occupation rent for the estate, if he personally occupied it.(t)

26. Where the trustee paid part of the purchase money into court in a cause, and it had been invested, and the funds had risen, he was refused the benefit of the rise, as he could not have been compelled to take the stock if it had fallen.(u)

27. In case of a resale the money allowed for improvements will be added to the amount of the purchase money, and the estate will be put up at the aggregate sum; deducting, however, an allowance for acts that deteriorate the value of the estate.(x) If any old buildings have been pulled down by the purchaser, and new ones erected, the old buildings, if they were incapable of repair, will be valued as old materials, but otherwise as buildings standing.(y)

28. But it is no ground in his favor that stocks have greatly risen since his purchase, so that he cannot lay out his money to the same advantage.(z)

29. If the trustee has actually sold the estate, the *cestui que trust* may compel the trustee to pay him what he may have received above the original purchase money.(a) If the *cestui que*

Jackson v. Van Dalsen, 5 John. 48; *Davoue v. Fanning*, 2 John. Ch. 252, 271; *Jennison v. Hapgood*, 7 Pick. 1, 8; *Hayward v. Ellis*, 13 Pick. 276; *Ex parte Wiggins*, 1 Hill Ch. 353, 355; *Crispin v. Taylor*, 2 Hill Ch. 434, 436; *Scott v. Freeland*, 7 Sm. & M. 410; *Baker v. Whiting*, 3 Sumner, 475, 487.]

(t) *Ex parte James*, 8 Ves. 337. [Where many lots of wild land were sold by an executor at auction, and to prevent a sacrifice he employed persons to bid upon them generally, without singling out particular lots as being more valuable than others, and most of the lots were bid in for him, it was held that the heirs must elect to consider him as a purchaser or a trustee of the whole, and that they could not af-

firm the sale as to part of the land and disaffirm it as to the residue. *Jennison v. Hapgood*, 10 Pick. 77, 111.]

(u) S. C.

(x) *Ex parte Hughes*, 6 Ves. 617; *Ex parte Bennett*, 10 Ves. 381; *Williamson v. Seaber*, 3 Yo. & Col. 717.

(y) 6 Mad. 2.

(z) *Ex parte James*, 8 Ves. 337.

(a) *Fox v. Mackreth*, 2 Bro. C. C. 400; *Ex parte Reynolds*, 5 Ves. 707; [*Hawley v. Cramer*, 4 Cowen, 717, 744; *Lazarus v. Bryson*, 3 Binn. 54, 58; *Jackson v. Walsh*, 14 John. 407, 415. Any difficulty in ascertaining the amount of profit in such case, will operate most hardly against the trustee. *Brackenridge v. Holland*, 2 Blackf. 377, 383.]

trust adopt the sale by the trustee, he must submit to it altogether.(b)

30. Generally, although there be no fraud, the trustee ought to pay the costs of a suit occasioned by his improper dealing with the estate.(c) And where infants are concerned, the decree for the resale will be with costs.(d)

31. Where the property has been resold by the trustee, although a like property can be purchased, as where the subject is a share in a public company, whose shares are on sale, the court will not decree it to be replaced, but compel the trustee to account for the profit with interest.(e)

32. A purchaser from the trustee with notice of the previous transaction would be liable to the same equity as the trustee was subject to.(f) But this doctrine cannot be extended to the mere case of a purchase by a trustee in his own name, from his *cestui que trust*, which may or may not be binding, according to circumstances, unless the purchaser have also notice that the sale was not such as could be supported in equity.

*33. The *cestui que trust* may bind his right by a long acquiescence.(g) In *Purcell v. Kelly*,(h) where a sale to an agent was set aside, yet as sixteen years had elapsed before relief was sought, the seller was not relieved against an agreement by the purchaser to settle the estate on his marriage. And of course

(b) *Gresley v. Mousley*, *ubi sup.* 8 Jur. N. S. 320.

(c) But see *Baker v. Carter*, 1 Yo. & Col. 250.

(d) *Sanderson v. Walker*, 13 Ves. 601.

(e) *Hall v. Hallet*, 1 Cox, 134; [1 Dart V. & P. (4th Eng. ed.) 38.]

(f) *Randall v. Errington*, 10 Ves. 423; *Cookson v. Lee*, 23 L. J. 473; [Murray v. Ballou, 1 John. Ch. 574, 575; *Shelton v. Homer*, 5 Met. 462; *ante*, 692, note.]

(g) *Ex parte James*, 8 Ves. 337; *Hall v. Noyes*, 3 Ves. 748, 11 Ves. 226; *Morse v. Royal*, 12 Ves. 355; *Medlicott v. O'Donel*, 1 Bal. & Beat. 156; *Champion v. Rigby*, 1 Rus. & My. 539; *Roberts v. Tunstall*, 4 Hare, 257, 5 Ves. 681; *Norris v. Neve*, 3 Atk. 26; *Gregory v. Gregory*, 3 Co. 201; *Purcell v. Kelly*, Beat. 492; 3 & 4 Will. 4, c. 27, s. 24-27; *sup.* ch. 12.

[1 Dart V. & P. (4th Eng. ed.) 41, 42; *Wright v. Vanderplank*, 2 K. & J. 1; 7 De G., M. & G. 597. The *cestui que trust* must pursue his remedy within a reasonable time, *ante*, 687, note, and cases cited. What shall be deemed a reasonable time cannot be exactly defined, but must depend upon the circumstances of the case, and the sound discretion of the court. See *Butler v. Haskell*, 4 Desaus. 702; *Bergen v. Bennett*, 1 Caines Cas. 1; *Jennison v. Hapgood*, 7 Pick. 1, 8, 9; *Hawley v. Cramer*, 4 Cowen, 717, 743; *Dobson v. Racey*, 3 Sandf. 61; *Ward v. Smith*, 3 Sandf. 592, 596; *Bell v. Webb*, 2 Gill, 164, 170; *Michoud v. Girod*, 4 How. (U. S.) 504, 661.]

(h) Beat. 492; *Baker v. Read*, 18 Ves. 398; see *Savery v. King*, 5 H. L. Cas. 627; *Harcourt v. White*, 28 Beav. 303.

acquiescence applies to the case of a purchase by an attorney from his client.(i)

34. But laches does not apply to a body of creditors, who may, therefore, claim the aid of equity at a much more distant period after the sale than an individual can.(j) And the question as to acquiescence cannot arise until it is ascertained that the *cestui que trust* knew his trustee had become the purchaser.(k)(1)

35. A purchase by a trustee from his *cestui que trust* admits of confirmation. But the party confirming must not be under the control of the person whose title is to be confirmed, and he must have a full knowledge of all the circumstances, and of his power to set aside the former transaction.(l)

(i) Lord Clanricarde v. Henning, 7 Jur. N. S. 1113; see Gresley v. Mousley, 1 Giff. 457, 4 De G. & J. 78, 8 Jur. N. S. 320.

(j) Whichcote v. Lawrence, 3 Ves. 740; 6 Ves. 632; York B. Co. v. Mackenzie, 8 Bro. P. C. by T. 42; see Bright v. Leger-ton, 2 De G., F. & J. 606.

(k) 10 Ves. 427; 2 Bal. & Beat. 129; Charter v. Trevelyan, 11 Cl. & Fin. 714; Lord Clanricarde v. Henning, *ubi sup.*; [Lewin Trusts (5th Eng. ed.), 370; Prevost v. Gratz, 1 Peters C. C. 370. Time will not run against a *cestui que trust* until he be *sui juris*. Lewin Trusts (5th Eng. ed.), 370; 1 Dart V. & P. (4th Eng. ed.) 42.]

(l) Morse v. Royal, 12 Ves. 355; Murray v. Palmer, 2 Sch. & Lef. 474; Roche v. O'Brien, 1 Bal. & Beat. 330; Wood v. Downes, 18 Ves. 120; Dunbar v. Tredennick, 2 Bal. & Beat. 304; Cockerell v. Cholmeley, 1 Rus. & My. 418; Small v. Attwood, 10 Cl. & Fin. 232; Salmon v. Cutts, 4 De G. & Sm. 125; *aff'd* by L. C. 16 Jur. 623, the case of attorney and client; [Lewin Trusts (5th Eng. ed.), 371, 372; 1 Dart V. & P. (4th Eng. ed.) 43; Skottowe v. Williams, 3 De G., F. & J. 535; Marker v. Marker, 9 Hare, 16; *ante*, 687, note; Beeson v. Beeson, 9 Barr, 279.]

(1) Where a director of one company purchased a concession of another line by the authority and with the money of his company, and it afterwards appeared that he purchased from himself, being the concealed owner of the concession; it was held that he was liable to his company, but that they were bound to adopt or repudiate the transaction altogether; and that they had lost all right to relief by the sale of the concession pending the suit; Great Luxembourg Ry. Co. v. Magnay, 25 Beav. 586.

* CHAPTER XXI.

OF JOINT PURCHASES; PURCHASES IN THE NAMES OF THIRD PERSONS; AND PURCHASES WITH TRUST MONEY: AND OF THE PERFORMANCE OF A COVENANT TO PURCHASE AND SETTLE AN ESTATE.

SECTION I.

OF JOINT PURCHASES, AND PURCHASES IN THE NAMES OF THIRD PERSONS.

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| <ol style="list-style-type: none">1. Equal or unequal advance of purchase money. — Expenditure on repairs by one. — Severance of joint tenancy in equity. — In partnership, no survivorship in equity. — Building-leases to two.3. Issue directed whether purchase for trade.4. No partition whilst common object unperformed.5. Contract to sell to two. — Parol evidence inadmissible that one was the purchaser. — Abatements on incumbrances inure to both. — So a new lease to one.6. Covenant to pay mortgage money.7. Conveyance to one, trust for the other proved by letters.8. Desisting to treat in favor of another.9. Where upon completion of conveyance by one, the other must accept the title, &c.10. Purchase in the name of stranger a trust. — Clear proof required.11. Evidence from alleged owner's poverty. — Conveyance by one to another as purchaser, lien only for purchase money. | <ol style="list-style-type: none">12. Unless some written evidence to prove trust.13. Parol express trust prevents resulting trust. — Parol evidence in favor of alleged trustee.14. Enjoyment under a purchase in names of purchaser and a stranger jointly.15. Purchase by agent. — Conviction of agent of perjury.16. Purchase in the name of a child, no trust. — Copyholds for lives.17. Child already advanced. — Child treated as a trustee from the first.18. Possession by the father. — Expenditure by the father for repairs.19. Subsequent declaration of trust by father inoperative. — Election.20. Conveyance to sever joint tenancy.21. Purchase in the joint names of father and son, an advancement.22. Operation of 27 Eliz. — And of bankrupt acts.23. Purchase by grandfather in the name of grandchild.24. Purchase by husband in the name of wife.25. Purchase by trader in the name of wife or child. |
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1. WHERE several persons purchase lands, and advance the money in equal proportions, and take a conveyance to them and

their heirs, this is a joint tenancy, that is, a purchase by them jointly of the chance of survivorship, which may happen to the one of them as well as to the other. (a) But dealings by the parties with the estate as tenants in common and other facts showing that they purchased as *such may, either establish the real nature of the purchase, or amount to a severance of the joint tenancy. (b) But where the proportions of the money are not equal, and *this appears in the deed itself*, (1) this makes them in the nature of partners. (c) So tenants in common of a mort-

(a) *Moyses v. Gyles*, 2 Ver. 385; *York v. Eaton*, 2 Free. 23; *Thicknesse v. Vernon*, 2 Free. 84; *Anon. Carth.* 15; 3 Atk. 735; 2 Ves. 258; *Rea v. Williams*, Ves. App. Purch. No. 24; *Aveling v. Knipe*, 19 Ves. 441; *Bone v. Pollard*, 24 Beav. 283; [*Robinson v. Preston*, 4 K. & J. 505; see *Jackson v. Jackson*, 9 Ves. (Sumner's ed.) 591, 597, in note. The general rule in the United States is, that all estates vested in two or more persons are to be deemed tenancies in common, unless a different tenure is clearly expressed or implied in the instrument creating the estate. The subject is very generally regulated by statute in the several States. In some of the States particular kinds of conveyances are excepted; as mortgages. In some, conveyances to persons holding particular relations are excepted; as to husband and wife, to trustees and executors as such. The incident of survivorship has been entirely abolished in several of the States, and in others it has been very much restricted, and reduced in the extent of its operation. "The doctrine of survivorship is not in accordance with the genius of our institutions." *Morton J. in Burnett v. Pratt*, 22 Pick. 557. The law upon this

subject has been stated with his usual clearness by Mr. Chancellor Kent, 4 Kent (11th ed.), 357 *et seq.*]

(b) *Harrison v. Barton*, 1 J. & H. 287, *infra*. [The court will give a favorable influence to every circumstance tending to defeat a joint tenancy and to convert it into a tenancy in common. *Robinson v. Preston*, 4 K. & J. 505; *Tompkins v. Mitchell*, 2 Rand. 428; *Brothers v. Porter*, 6 B. Mon. 106; *Barribear v. Brant*, 17 How. (U. S.) 43; *Randall v. Phillips*, 3 Mason, 378.]

(c) 2 Ves. 258; consider *Harris v. Fergusson*, 16 Sim. 308; 4 K. & J. 515; [2 Dart V. & P. (4th Eng. ed.) 844, 845. In *Randall v. Phillips*, 3 Mason, 378; Mr. Justice Story decided that under the statute of Rhode Island, which provides that all deeds, &c., to two or more persons shall be taken to create tenancies in common, unless the words clearly and manifestly show an intention to create a joint tenancy, a mortgage to four persons affords no proof that the parties intended a joint tenancy in the mortgage. See *Caines v. Grant*, 5 Binn. 119. The contrary had, however, previously been held in Massachusetts, under a similar statute, in *Appleton v. Bird*, 7 Mass. 131; *Goodwin v. Richard-*

(1) V. C. Wood, in quoting this passage in *Harrison v. Barton*, observed, correctly, that these words are not in the case referred to, but he gave the writer credit for having found them in some other authority, and of this the writer himself has no doubt; he is in possession of MS. reports of many of the cases of that period, but he cannot find the passage. The passage as it stands, however, is correct; but it must not be considered to exclude proper evidence of the manner in which the money really was paid.

gage were held to be also tenants in common of the equity of redemption for which they had contracted, but there also they paid an equal proportion for the purchase.(d) So if afterwards one of them lays out money in repairs or improvements, and dies, this shall be a lien on the land, and a trust for his representative.(e) But where A. and B. were joint owners of a house, and B. advanced money to A., who, without any contract laid it out in the improvement of the house, B. was held to have no lien on the moiety of A. for the money so expended. It was not considered to be a case of partnership.(f) A conveyance by the purchasers to a trustee without any consideration, and without any express intent to sever the joint tenancy, will not have that effect,(g) but a contract for sale will sever the joint tenancy.(h) But in all cases of a joint undertaking, or partnership, the survivor will in equity be a trustee for the representative of the deceased partner as to his share whether the purchase be in fee,(i) or of a building lease, and money be laid out in erecting houses.(k)

son, 11 Mass. 469, and reaffirmed in *Burnett v. Pratt*, 22 Pick. 556; and so in *Maine, Kinsley v. Abbott*, 19 Maine, 430; but in *Burnett v. Pratt*, it was decided that a mortgage given to two persons to secure their several demands is several and not joint; each has a right to enforce his claim under the mortgage, in a form adapted to his case; and of course the surviving mortgagee cannot maintain an action on the mortgage to enforce payment of the debt due to the deceased mortgagee. Even where a joint debt is secured by mortgage, after foreclosure the mortgagees become tenants in common. *Burnett v. Pratt*, 22 Pick. 558; *Goodwin v. Richardson*, 11 Mass. 469; see 2 Story Eq. Jur. § 1206; *Caines v. Grant*, 5 Binn. 119.]

(d) *Edwards v. Fashion*, Prec. C. 332; *Aveling v. Knipe*, 19 Ves. 444; see *Robinson v. Preston*, 4 K. & J. 505.

(e) *Lake v. Gibson*, 1 Eq. Ca. Ab. 290, pl. 3. [See 2 Story Eq. Jur. § 1236.]

(f) *Kay v. Johnson*, 21 Beav. 536.

(g) *Rea v. Williams*, MS. App. Purch. No. 21.

(h) *Kingsford v. Ball*, 2 Giff. App. 1.

(i) *Lake v. Gibson*, *ubi sup.*; *Hayes v. Kingdome*, 1 Ver. 33; *Jeffreys v. Small*, 1 Ver. 217; *Lake v. Craddock*, 3 P. Wms. 158 (1); *Morris v. Barrett*, 3 Yo. & Jer. 384; *Dale v. Hamilton*, 5 Hare, 369; *Clements v. Hall*, 2 De G. & J. 173.

(k) *Lyster v. Dolland*, 1 Ves. jr. 431, 2 Ves. jr. 631; *Elliot v. Brown*, 9 Ves. 597; *Vickers v. Cowell*, 1 Beav. 529, as to mortgage money; *Senhouse v. Christian*, 19 Ves. 157; *Prendergast v. Turton*, 1 Yo. & Col. C. C. 106. [The rules and principles by which partners hold real estate, purchased by them with partnership funds and for partnership purposes, have

(1) Lord Chancellor King said, that that was plainly a tenancy in common in equity, though otherwise at law; and the defendant Craddock having only a title in equity, that he must do equity; and that this was equitable in all its branches; for he had his election to drop all claim, or to take it on the same footing with the rest of the partners; and that it was not reasonable that he should be let into the account of the profits or loss of the undertaking until he had made his election, MS.; see *Clegg v. Edmondson*, 3 Jur. N. S. 299.

2. But equity will not relieve, unless the person seeking relief will do what he equitably ought.(1)

been considerably discussed in America, and many decisions have been made on the subject. The doctrine established by several decisions in Massachusetts is that where real estate is purchased by partners with partnership funds, for partnership use and convenience, although it is conveyed to them in such form as to make them tenants in common, yet in the absence of an express agreement, or of circumstances showing an intent that such estate should be held for their separate use, it will be considered and treated, in equity, as vesting in them in their partnership capacity and clothed with an implied trust, that they shall hold it until the purposes for which it was so purchased shall be accomplished, and that it shall be applied, if necessary, to the payment of the partnership debts. Upon the dissolution of the partnership by the death of one of the partners, the survivor has an equitable lien upon such real estate for his indemnity against the debts of the firm, and for securing the balance that may be due to him from the deceased partner, on settlement of the partnership accounts between them; and the widow and heirs of such deceased partner have no beneficial interest in such real estate, nor in the rent received therefrom after his death, until the surviving partner is so indemnified. Such was the decision in *Dyer v. Clark*, 5 Met. 562. In *Howard v. Priest*, 5 Met. 582, 585, Mr. Chief Justice Shaw, in giving the opinion of the court, as to the disposition to be made of real estate belonging to a partnership, said: "It shall not be considered a joint tenancy at law, because it would be contrary to the policy of the law by giving a *jus accrescendi* at common law in case of survivorship, where no such intent or purpose can be presumed. The rule of holding it a trust estate in regard to partners is founded on the equity of the surviving partner, who, being made chargeable with all the debts of the firm, ought

to have the control of all the partnership property as assets, first for the payment of the debts of the firm; and secondly, for the restoration to himself, on settlement of the partnership account, of that part of the capital which has been contributed by him to the common stock. The true and actual interest of each partner in the common stock is the balance found due to him after the payment of the debts and the adjustment of the partnership account." "As the widow and heirs can claim only in right of the husband and father, such derivative right in equity will extend no further in behalf of the wife and children than that of the partner from whom it was derived." See *Burnside v. Merrick*, 4 Met. 537; *Peck v. Fisher*, 7 Cush. 386; *Ensign v. Briggs*, 6 Gray, 329; *Fall River Whaling Co. v. Borden*, 10 Cush. 458; *Collyer Partn.* (5th Am. ed.) § 135 *et seq.*, & notes. But in Massachusetts the real estate of a partnership is not regarded as converted "out and out" into personal estate for all purposes. The interest of a deceased partner in the real estate of his firm, which is not required for the payment of partnership debts or the adjustment of balances between the partners, is to be treated as realty in the settlement of his estate. *Wilcox v. Wilcox*, 13 Allen, 252; *Shearer v. Shearer*, 98 Mass. 107. It is wholly immaterial, in the view of a court of equity in whose name or names the title of the real estate of a partnership has been taken, whether of one partner, or of all; whether in the name of a stranger, or of one of the firm. In either case, let the legal title be vested in whom it may, it is in equity deemed partnership property, and the partners are the *cestuis que trust*. *Hoxie v. Carr*, 1 Sumner, 173, 182, 183. Where the legal title does not correspond with the equitable interests of the several partners, it is held in trust, and

(1) Cases in n. (i):

* 3. If it be doubted whether the purchasers bought the property to carry on trade, an inquiry will be directed in chambers to ascertain the fact.(m)(1)

4. If the purchasers agree to deal with the estate as an entirety, for example, to lay it out in streets and sell it in lots, the representatives of one of them cannot claim a partition whilst the agreement subsists.(n)

5. Although an agreement be to sell and convey to two, their heirs, &c., *some or one of them*, yet the seller will not be warranted in conveying the estate to one of the purchasers only.(o) And on an agreement to sell to two jointly, it cannot be proved by parol evidence that one of them was to be the sole purchaser, and the other to have a security for the money he advanced.(p) And where the purchase is in equity considered to be made for their equal benefit, *and on a mutual trust between them*, if one have abatements made to him by some of the incumbrancers, in

the office of equity in such case is merely to declare the trusts, and compel the legal title, to serve the equitable interest. This is accomplished, by directing such conveyances as will make the legal title of the several parties conform to their respective beneficial interests. *Shearer v. Shearer*, 98 Mass. 107. In this case the authorities

are very fully cited and considered by the counsel and by the court.

(m) See 1 Ves. jr. 435. [See *Steward v. Blakeway*, L. R. 6 Eq. 479; S. C. L. R. 4 Ch. Ap. 603; 1 Story Eq. Jur. §§ 152-154, 156, 160.]

(n) *Peck v. Cardwell*, 2 Beav. 137.

(o) *Davis v. Symonds*, 1 Cox, 402.

(p) S. C.

(1) Whether the property as between the representatives shall be deemed real or personal, see *Thornton v. Dixon*, 3 Bro. C. C. 199; *Bell v. Phyn*, 7 Ves. 453; *Bateman v. Shore*, 9 Ves. 500; *Mackintosh v. Townsend*, 1 Mon. Partn. notes, 97; *Selkrig v. Davies*, 2 Dow, 231; *Crawshay v. Maule*, 1 Swan. 495; *Fereday v. Wightwick*, 1 Russ. & My. 45; *Phillips v. Phillips*, 1 My. & Ke. 649; *Broom v. Broom*, 3 My. & Ke. 443; *Randall v. Randall*, 7 Sim. 271; *Bligh v. Brent*, 2 Yo. & Col. 260; *Houghton v. Houghton*, 11 Sim. 491; *Rowley v. Adams*, 7 Beav. 548; *Tibbits v. Phillips*, 10 Hare, 355; *Darby v. Darby*, 3 Drew. 495; *Dale v. Hamilton*, 5 Hare, 369; [and compare, *Steward v. Blakeway* L. R. 6 Eq. 479; affirmed L. R. 4 Ch. Ap. 603; *Essex v. Essex*, 20 Beav. 420; see *Shearer v. Shearer*, 98 Mass. 107; *Collyer Partn.* (5th Am. ed.) § 135 *et seq.*, & notes;] that a partnership in buying and selling land may be established by parol, *In re Streatfield & others*, 7 Jur. N. S. 715; [S. C. *sub nom.* *Bank of England case*, 3 De G., F. & J. 645; *Collyer Partn.* (5th Am. ed.) § 3, & notes; *Caddick v. Skidmore*, 2 De G. & J. 52 (Am. ed.). note (1); 1 *Lindley Partn.* (Eng. ed. 1860) 82; *Smith v. Burnham*, 3 Sumner, 435, 458, 471; *Story Partn.* § 83; *Bunnel v. Taintor*, 4 Conn. 568; *Fall River Whaling Co. v. Borden*, 10 Cush. 458; *Pitts v. Waugh*, 4 Mass. 246; *Gray v. Palmer*, 9 Cal. 616; *Black v. Black*, 15 Geo. 445; *Patterson v. Grace*, 10 Ala. 444; *Sergeant J. in Hale v. Henrie*, 2 Watts, 145, 147; *Tucker J. in Wheatley v. Calhoun*, 12 Leigh, 264.]

consideration of services and friendship, for his own use, yet he must account to the other for these advantages.(q) So a new lease obtained by one partner shall inure to both,(r) although he obtained it on his own account;(s) but the expense of renewal will be a charge on the estate.(t) If one of several purchasers secretly obtain from the seller a bonus for his pains in effecting the sale, he will be compelled to account for it to his co-purchasers.(u)

6. If two persons purchase an estate subject to a mortgage, and each covenants with the other to pay his share of the money, they do not make their personal estate, as between their representatives, the primary fund for payment of the mortgage money.(x) And it seems that where two or more persons purchase an estate, and one, for instance, pays all the money, and the estate is conveyed to them both, the one who paid the money cannot call upon the other who * paid no part of it to repay him his share of the purchase money, or to convey his share of the estate to him; for by payment of all the money he gains neither a lien nor a mortgage, because there is no contract for either; nor can it be construed a resulting trust, as such a trust cannot arise at an after period; and perhaps the only remedy he has, is to file a bill for a contribution.(y) Whenever, therefore, two persons agree to purchase an estate, it should be stipulated in the agreement, that if by the default of either of them the other shall be compelled to pay the whole, or greater part of the purchase money, the estate shall be conveyed to him, and he shall hold the entirety against the other and his heirs, unless he or they shall, within a stated time, repay the sum advanced on their account, with interest in the mean time.

(q) *Carter v. Horne*, 1 Eq. Ca. Ab. 7, pl. 13.

(r) *Burroughs v. Elton*, 11 Ves. 29; [*Clegg v. Fishwick*, 1 Mac. & G. 294, 299, note (1), and cases cited; *Clegg v. Edmondson*, 8 De G., M. & G. 787; *Leach v. Leach*, 18 Pick. 68; *Clements v. Hall*, 2 De G. & J. 173.]

(s) *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Gordon v. Scott*, 12 Moo. P. C. 1.

(t) *Hamilton v. Denny*, 1 Bal. & Beat. 199.

(u) *Beck v. Kantorowicz*, 3 K. & J. 230.

(x) *Forrester v. Ld. Leigh*, Amb. 171. Vide *sup.* p. 194; 17 & 18 Vict. c. 113.

(y) *Wood v. Birch*, and *Wood v. Norman*, Rolls 7 & 8 March 1804; the decree in which case does not, however, authorize the observation, but the author conceives it to follow, from what fell from the master of the rolls at the hearing.

7. Where several persons purchase an estate, and the conveyance is taken in the name of one of them, ^(y¹) the trust may be proved by letters written *subsequently* to the purchase, ^(z) for the statute only requires the trust to be manifested by some writing signed by the party who is by law enabled to declare the trust. ^(a) And the real purchaser may of course declare the trust of the property, and the declaration may be valid, although to take effect after his death, and not operative as a testamentary disposition. ^(b)

8. But although two persons enter into a treaty for the purchase of an estate, and one of them desists, upon the other promising, by parol, to let him have the part of the estate he desired, yet although such a contract is not illegal, ^(c) it seems that this agreement cannot be enforced on account of the statute of frauds. ^(d)

(y¹) [If a joint purchase be made in the name of one of several co-purchasers, parol evidence is admissible to prove the fact, and he will be held a trustee of a moiety for the other. Such a case is a resulting trust not within the statute of frauds. *Powell v. Monson & Brownfield Manuf. Co.* 3 Mason, 348; *Hopkinson v. Dumas*, 42 N. H. 296; *McDonald v. McDonald*, 24 Ind. 68.]

(z) 29 Car. 2, c. 3, s. 7; n. (1) to Sugd. *Gilb. Uses*, 111; *Forster v. Hale*, 3 Ves. 696, 5 Ves. 308; *Randall v. Morgan*, 12 Ves. 67; *Dale v. Hamilton*, 5 Hare, 369, 2 Phil. 266. [See *ante*, 135, & notes; *Steere v. Steere*, 5 John. Ch. 1; *Bentley v. Mackay*, 15 Beav. 12; *Childers v. Childers*, 1 De G. & J. 482; *O'Hara v. O'Neill*, 7 Bro. P. C. 227.]

(a) *Smith v. Matthews*, 30 L. J. N. S. 445; [2 *Dart V. & P.* (4th Eng. ed.) 850; *Moran v. Hayes*, 1 John. Ch. 339, 342; 4 *Kent* (11th ed.), 305; *Leman v. Whitley*, 4 Russ. 423; *Fisher v. Fields*, 10 John. 495; *Steere v. Steere*, 5 John. Ch. 1; *Rathbun v. Rathbun*, 6 Barb. 105, 106; *Rutledge v. Smith*, 1 McCord Ch. 119; *Johnson v. Ronald*, 4 Munf. 77; 1 *Cruise Dig.* by Mr. Greenleaf, tit. 12, ch. 1, § 37, in note; *Brown v. Brown*, 1 Strobh. Eq.

363; *Unitarian Society v. Woodbury*, 14 Maine, 281; *McCubbin v. Cromwell*, 7 Gill & J. 157; *Barrell v. Joy*, 16 Mass. 221; *Pinney v. Fellowes*, 15 Vt. 525; *Hutchinson v. Tindall*, 2 Green Ch. 357; *Lane v. Ewing*, 31 Missou. 75. In some of the United States, the language of the statute of frauds in reference to trusts corresponds with the text, but in other States the language of the requirement is different; viz., substantially that "the trust must be created or declared by an instrument in writing signed by the party." See *Perry Trusts*, § 78, & note, §§ 79-82. The two forms of language are, however, generally considered to be the same in effect. *Pinnacle v. Clough*, 17 Vt. 508; *Jenkins v. Eldredge*, 3 Story, 294; *Pratt v. Ayer*, 3 Chand. 265; *Corse v. Leggett*, 25 Barb. 394.]

(b) *Tierney v. Wood*, 23 L. J. N. S. 895; [Lewin *Trusts* (5th Eng. ed.), 47; *Donohoe v. Conrahy*, 2 J. & L. 688.]

(c) *Galton v. Emuss*, 1 Col. 243; see *Booker v. Seddon*, 1 Fost. & Fin. 196, a singular case; *In re Carew's Estate*, 26 Beav. 187.

(d) *Lamas v. Bailey*, 2 Ver. 627; *Riddle v. Emerson*, 1 Ver. 106; 5 Vin. Ab. 521, pl. 32; *Atkins v. Rowe*, Mos. 39, Cases,

9. From the case of *Smith, treasurer of the West India Dock Company v. The Corporation of London*,^(e) it should seem that where *two persons agree to purchase an estate, and one of them, by agreement between them, completes the purchase, and pays the money, the other must agree to accept the title, and pay his share of the purchase money, before he can call for an inspection of the title deeds, in order to investigate the title; unless the one who purchased can be charged with such gross negligence, or wilful default, as will strip an agent, as such, of the protection which that character gives him in all transactions in which he duly acts according to his agency; and in case any such gross negligence or wilful default can be proved, the injured party will have a remedy in equity, although he may have paid his share of the purchase money.

Where the Purchase is in the Name of a Stranger.

10. If a man purchase an estate, and do not take the conveyance in his own name only, the trust of the legal estate, whether freehold, copyhold, or leasehold; whether in the name of the purchaser and others jointly, or in the names of others, without that of the purchaser; whether in one name or several; whether jointly or *successive*, results to the man who advances the purchase money,^(f) unless such a resulting trust would break in

D. P. 1730 (1); *Crop v. Norton*, 9 Mod. 233; *Donohoe v. Conrahy*, 2 J. & L. 688; *Caddick v. Skidmore*, 2 De G. & J. 52, a case of alleged partnership in a mine; *Clifford v. Kelly*, 7 Ir. Ch. Rep. 333, a case of alleged waiver. [See *Henderson v. Hudson*, 1 Munf. 510. A parol contract to purchase land jointly and divide it, is within the statute of frauds and invalid. *Henley v. Brown*, 1 Stewart, 144. So an agreement to procure the convey-

ance of land by another. *Gray v. Patton*, 2 B. Mon. 12. But see *contra*, *Bannon v. Bean*, 9 Iowa, 395.]

(e) Ch. Dec. 16, 1801; and many previous days, MS.

(f) Per C. B. Eyre, *Dyer v. Dyer*; [1 Watk. Cop. 218; S. C. 2 Cox, 93; *Trench v. Harrison*, 17 Sim. 111; *Lewin Trusts* (5th Eng. ed.), 132 *et seq.*; *Newell v. Morgan*, 2 Harr. 225; *Bank of United States v. Carrington*, 7 Leigh, 566; *Hen-*

(1) From the printed cases it appears that the defendant by his answer denied the agreement, and the cause being at issue, witnesses were examined on both sides. There was a contrariety of evidence, but the plaintiff proved the agreement by one positive witness, corroborated by circumstances. But the chancellor dismissed the bill without costs, and his decree was affirmed by the Lords.

upon the policy of an act of parliament.(g) And so it is on a purchase by several in the name of one.(h) A custom that the

derson v. Hoke, 1 Dev. & Bat. Eq. 149; M'Guire v. M'Gowen, 4 Desaus. 491; Perry v. Head, 1 A. K. Marsh. 47; Boyd v. M'Lean, 1 John. Ch. 582; Botsford v. Burr, 2 John. Ch. 405; Steere v. Steere, 5 John. Ch. 1; Powell v. Monson & Brimfield Manuf. Co. 3 Mason, 347; Dorsey v. Clarke, 4 Harr. & J. 551; Hall v. Sprigg, 7 Martin, 243; Jackman v. Ringland, 4 Watts & S. 149; 4 Kent (11th ed.), 305, 306; Jackson v. Moore, 6 Cowen, 706; Methodist Epis. Church v. Jaques, 1 John. Ch. 450; Denton v. M'Kenzie, 1 Desaus. 289; Kiskler v. Kiskler, 2 Watts, 324; Scooby v. Blanchard, 3 N. H. 170; Dean v. Dean, 6 Conn. 288; Owings v. Owings, 1 Gill & J. 484; Starr v. Starr, 1 Ham. 328; Pritchard v. Brown, 4 N. H. 397; Page v. Page, 8 N. H. 187; Letcher v. Letcher, 4 J. J. Marsh. 592; Elliott v. Armstrong, 2 Blackf. 198; Doyle v. Sleeper, 1 Dana, 536; Buck v. Pike, 2 Fairf. 9; Dealty v. Murphy, 3 A. K. Marsh. 477; Sweet v. Jacocks, 6 Paige, 355; Jennison v. Graves, 2 Blackf. 440; Blair v. Bass, 4 Blackf. 540; Piatt v. Oliver, 2 McLean, 267; Getman v. Getman, 1 Barb. Ch. 499; Union Bank v. Baker, 8 Humph. 447; Thomas v. Walker, 6 Humph. 43; Williams v. Hollingsworth, 1 Strobh. Eq. 103; Murdock v. Hughes, 7 Sm. & M. 219; Raymond v. Holden, 2 Cush. 264, 268; Peabody v. Tarbell, 2 Cush. 232; Livermore v. Aldrich, 5 Cush. 435; McGowan v. McGowan, 14 Gray, 121; Buck v. Warren, 14 Gray, 122, note; Kendall v. Mann, 11 Allen, 15; Root v. Blake, 14 Pick. 271; Perkins v. Nichols, 11 Allen, 542; Davis v. Wetherell, 11 Allen, 19; Baker v. Vining, 30 Maine, 126; Kelley v. Jenness, 50 Maine, 455; Hopkinson v. Dumas, 42 N. H. 296; Hall v. Young, 37 N. H. 134; Tebbetts v. Tilton, 31 N. H. 283; Pembroke v. Allenstown, 21 N. H. 107; Dow v. Jewell, 18 N. H. 340; Tyford v. Thurston, 16 N. H. 399; Dewey v. Long, 22 Vt. 564; Pinney v.

Fellows, 15 Vt. 525; Hoxie v. Carr, 1 Sumner, 187; Jackson v. Matsdorf, 11 John. 91; Jackson v. Morse, 16 John. 197; White v. Carpenter, 2 Paige, 218; Kellogg v. Wood, 4 Paige, 579; Partridge v. Havens, 10 Paige, 618; Lounsbury v. Purdy, 16 Barb. 376; Harder v. Harder, 2 Sandf. Ch. 17; Gomez v. Tradesman's Bank, 4 Sandf. S. C. 106; Lloyd v. Carter, 17 Penn. St. 216; Lynch v. Cox, 23 Penn. St. 265; Beck v. Graybill, 28 Penn. St. 66; Stewart v. Brown, 2 Serg. & R. 461; Depeyster v. Gould, 2 Green Ch. 480; Howell v. Howell, 2 McCarter (N. J.), 75; Stratton v. Dialogue, 1 C. E.

(g) *Ex parte* Houghton, 17 Ves. 251; Redington v. Redington, 3 Rid. P. C. 106. [Thus, if an alien, for the purpose of evading any law of the State prohibiting aliens from holding real estate, should purchase land and pay the money and take a conveyance in the name of a third person, without any written declaration of trust, then courts of equity would never raise or enforce a resulting trust in favor of the alien purchaser, in fraud of the rights of the State, or the law of the land. Leggett v. Dubois, 5 Paige, 114; 2 Story Eq. Jur. § 1201 b; Phillips v. Crammond, 2 Wash. C. C. 441; Proseus v. McIntire, 5 Barb. 425; Ford v. Lewis, 10 B. Mon. 127; Baldwin v. Campfield, 4 Halst. Ch. 891; Hubbard v. Goodwin, 3 Leigh, 492; Taylor v. Benham, 5 How. (U. S.) 270.]

(h) Wray v. Steel, 2 Ves. & Bea. 388; [ante, 698, note; Hoxie v. Carr, 1 Sumner, 173; Shearer v. Shearer, 98 Mass. 107; Baumgarten v. Guessfield, 38 Missou. 36; Ross v. Hegeman, 2 Edw. Ch. 373; Larkins v. Rhoades, 5 Porter, 196; Keaton v. Cobb, 1 Dev. Ch. 439; Letcher v. Letcher, 4 J. J. Marsh. 590; Powell v. Monson & Brimfield Manuf. Co. 3 Mason, 590; Perry Trusts, § 132, and cases cited; Brothers v. Porter, 6 B. Mon. 106, 107, 108; Jenkins v. Eldredge, 3 Story, 183.]

nominee shall take beneficially cannot stand against the right in equity of the purchaser to the resulting trust.⁽ⁱ⁾ And although

Green (N. J.), 70; Johnson v. Dougherty, 3 C. E. Green (N. J.), 406; Stevens v. Wilson, 3 C. E. Green (N. J.), 447; Hollis v. Hollis, 1 Md. Ch. 479; Glenn v. Randall, 3 Md. Ch. 221; Farringer v. Ramsey, 2 Md. 365; Cecil Bank v. Snively, 23 Md. 253; Neale v. Hagthorpe, 3 Bland, 551; Garrett v. Garrett, 1 Strobb. Eq. 96; Kirkpatrick v. Davidson, 2 Kelly, 297; Taliaferro v. Taliaferro, 6 Ala. 404; Caple v. McCollum, 27 Ala. 461; Anderson v. Jones, 10 Ala. 401; Mahorner v. Harrison, 13 Sm. & M. 65; Walker v. Burngood, 13 Sm. & M. 764; Powell v. Powell, 1 Freem. Ch. 134; Runnells v. Jackson, 1 Howard (Miss.), 358; Leiper v. Hoffman, 26 Miss. 615; Rothwell v. De-wees, 2 Blackf. 613; Gaines v. Chew, 2 How. (U. S.) 619; McDonough v. Murdock, 15 How. (U. S.) 367; Long v. Steiger, 8 Texas, 460; McGuire v. Ramsey, 4 Eng. 519; Ensley v. Balentine, 4 Humph. 233; Stark v. Canady, 3 Litt. 399; Chaplin v. McAfee, 3 J. J. Marsh. 513; Creed v. Lancaster Bank, 1 Ohio St. 1; Williams v. Van Tuyl, 2 Ohio St. 336; Smith v. Sackett, 5 Gilm. 532; Williams v. Brown, 14 Ill. 200; Nichols v. Thornton, 16 Ill. 113; Seaman v. Cook, 14 Ill. 501; Bruce v. Roney, 18 Ill. 67; Baumgartner v. Guessfield, 38 Missou. 36; Kelly v. Johnson, 28 Missou. 249; Rankin v. Harper, 23 Missou. 579; Paul v. Chouteau, 14 Missou. 580; Ragan v. Walker, 1 Wis. 527; McLenan v. Sullivan, 13 Iowa, 521; Russell v. Lode, 1 Iowa, 566; Bayles v. Baxter, 22 Cal. 575; Millard v. Hathaway, 27 Cal. 119; Fairhurst v. Lewis, 23 Ark. 435; Butler v. Rutledge, 2 Cold. (Tenn.) 4. Payment of part of the purchase money gives to the owner of the money a proportional interest in the land. Kisler v. Kisler, 2 Watts, 324; Botsford v. Burr, 2 John. Ch. 405, 410; 4 Kent (11th ed.), 306; Hopkinson v. Dumas, 42 N. H. 296; McGowan v. McGowan, 14 Gray, 121; Smith v. Burnham, 3 Sumner, 466; Chadwick v. Felt, 35 Penn. St. 305. But, in order to have this effect, the payment of part of the purchase money must be made for some specific share or defined interest in the land; a general contribution of a sum of money toward the entire purchase is not sufficient. McGowan v. McGowan, 14 Gray, 119, 121; Sayre v. Townsend, 15 Wend. 647; White v. Carpenter, 2 Paige, 217; Perry v. McHenry, 13 Ill. 227; Baker v. Vining, 30 Maine, 121; Freeman v. Kelly, 1 Hoff. Ch. 90; Evans's Estate, 2 Ash. 470; Smith v. Burnham, 3 Sumner, 435, 466, 467; Crop v. Norton, 2 Atk. 74; Wray v. Steele, 2 Ves. & Bea. 388; Reynolds v. Morris, 17 Ohio St. 510; Cutler v. Tuttle, 4 C. E. Green Ch. 549; White v. Drew, 42 Missou. 561; Dudley v. Bachelder, 53 Maine, 403. The resulting trust must arise, if at all, at the time of execution of the deed; it cannot arise from subsequent payments or oral agreements. Rogers v. Murray, 3 Paige, 390; Barnard v. Jewett, 97 Mass. 87; Davis v. Wetherell, 11 Allen, 19, note; Buck v. Pike, 2 Fairf. 9; Steere v. Steere, 5 John. Ch. 1; Botsford v. Burr, 2 John. Ch. 409; Hoxie v. Carr, 1 Sumner, 188; Page v. Page, 8 N. H. 187; Brooks v. Fowle, 14 N. H. 260, 261; Jackson v. Moore, 6 Cowen, 726; 4 Kent (11th ed.), 305, 306; Freeman v. Kelly, 1 Hoff. Ch. 90, 93; White v. Carpenter, 2 Paige, 218; Pinnock v. Clough, 16 Vt. 500; Conner v. Lewis, 16 Maine, 268; Graves v. Dugan, 6 Dana, 331; Foster v. Trustees of Athenæum, 3 Ala. 302; Taliaferro v. Taliaferro, 6 Ala. 404; Williard v. Williard, 56 Penn. St. 119; Edwards v. Edwards, 39 Penn. St. 369; Coppage v. Barnett, 34 Miss. 621; Dudley v. Batchelder, 53 Maine, 403; Wallace v. Marshall, 9 B. Mon. 148; Gee v. Gee, 2 Sneed, 395; Cutler v. Tuttle, 4 C. E. Green Ch. 549; Loomis v. Loomis, 28 Ill. 454; Coe

(i) Lewis v. Lane, 2 My. & Ke. 449.

the person in whose name the conveyance is taken executes no declaration of trust, yet a trust will result,^(k) and may be proved by parol,^(l) even after the death of the nominal purchaser.⁽¹⁾(1)

v. Bradley, 49 Maine, 388; *Franchestown v. Deering*, 41 N. H. 438; see *Poulet v. Johnson*, 25 Geo. 403. Trusts resulting from the payment of the purchase money have been abolished by statute in New York. See *Norton v. Stone*, 8 Paige, 222; *Russell v. Allen*, 10 Paige, 250; *Bodine v. Edwards*, 10 Paige, 504; *Brewster v. Power*, 10 Paige, 562; *Jencks v. Alexander*, 11 Paige, 619; *Loundsbury v. Purdy*, 16 Barb. 376; *Watson v. Le Row*, 6 Barb. 481; *Siemon v. Schurck*, 29 N. Y. 598. So in Michigan. *Maynard v. Hoskins*, 9 Mich. 485. In Indiana, where a conveyance of real estate is made to one upon a consideration paid by another, a trust does not result under the statute, unless there is a *bonâ fide* agreement that the title shall be held for the use of the person paying the purchase money. *Glidewell v. Spangh*, 26 Ind. 319.]

(k) 29 Car. 2, c. 3, s. 8; *Hungate v. Hungate*, Tot. 184; *Gascoigne v. Thwing*, 1 Ver. 366; *Howe v. Howe*, 1 Ver. 415; *Anon.* 2 Vent. 361, n. (3); *O'Hara v. O'Neill*, 21 Vin. Ab. 497, n.; 2 Bro. P. C. 39; *Pelly v. Maddin*, 21 Vin. 498, pl. 15; *Sir Darcy Lever v. Andrews*, 7 Bro. P. C. by T. 288; *Ambrose v. Ambrose*, 1 P. Wms. 321; *Ex parte Vernon*, 2 P. Wms. 549; *Smith v. Baker*, 1 Atk. 385; *Lloyd*

v. Spillet, 2 Atk. 148; *Withers v. Withers*, Amb. 15; *Lade v. Lade*, 1 Wils. 21; *Smith v. Ld. Camelford*, 2 Ves. jr. 713; *Rider v. Kidder*, 10 Ves. 360.

(l¹) [Parol evidence is admissible to prove the facts upon which a resulting trust arises, although the deed acknowledges the consideration to have been paid by the nominal grantee. *Boyd v. McLean*, 1 John. Ch. 582; *Powell v. Monson & Brimfield Manuf. Co.* 3 Mason, 347; *Stark v. Canady*, 3 Litt. 399; *M'Guire v. M'Gowen*, 4 Desaus. 486; *Pugh v. Bell*, 1 J. J. Marsh. 403; *Pritchard v. Brown*, 4 N. H. 397; *Page v. Page*, 8 N. H. 187; *Livermore v. Aldrich*, 5 Cush. 431; *Peabody v. Tarbell*, 2 Cush. 226; *Perkins v. Nichols*, 11 Allen, 542, 546; *Botsford v.*

(l) *Lench v. Lench*, 10 Ves. 511; [*Boyd v. McLean*, 1 John. Ch. 582; *Freeman v. Kelly*, 1 Hoff. Ch. 90, 98; 1 Greenl. Ev. § 266; 1 Cruise Dig. by Mr. Greenleaf, tit. 12, ch. 1, § 45, in note; 2 Story Eq. Jur. § 1201, n.; *Harder v. Harder* 2 Sandf. Ch. 17; *Fausler v. Jones*, 7 Ind. 277; *Neill v. Keese*, 5 Texas, 23; *Livermore v. Aldrich*, 5 Cush. 435; *Depeyster v. Gould*, 2 Green Ch. 474; *Unitarian Soc. in Portland v. Woodbury*, 14 Maine, 281; *Lewin Trusts* (5th Eng. ed.), 138.]

(1) This is said to be otherwise where the consideration is expressed to be paid by the nominal purchaser, and he is dead, in *Sand. n. to Lloyd v. Spillet*, 2 Atk. 150; 1 Sand. on Uses (3d ed.), 123, pp. 259, 260; and this is carried further in *Rob. Stat. Frauds*, 99; but these views are not supported by the authorities upon which they depend (*Kirk v. Webb*, Pre. C. 84; *Newton v. Preston*, *Ib.* 133; *Gascoigne v. Thwing*, 1 Ver. 366; *Hooper v. Eyles*, 2 Ver. 280; *Crop v. Norton*, 3 Atk. 74; see *Deg v. Deg*, 2 P. Wms. 414). In *Lench v. Lench*, it was considered to be settled generally that money may in this manner be followed into the land; and in *Sir John Peachy's case*, *Rolls*, E. T. 1759, MS. *Sir Thomas Clark* said, that frauds were out of the statute of frauds, for that the judges had resolved it was absurd that a statute made to prevent frauds should be made a handle to support them. [*Jenkins v. Eldredge*, 3 Story, 183.] And therefore if A. sold an estate to C. and the consideration was expressed to be paid by B., and the conveyance made to B., the court would allow parol evidence to prove the money paid by C.

But unless the trust arise on the face of the deed itself, the proofs must be very clear; (*m*) and it seems doubtful * whether parol evidence is admissible against the answer of the trustee denying the trust. (*n*) The claimant should not delay asserting

Burr, 2 John. Ch. 405; *Livingston v. Livingston*, 2 John. Ch. 537, 540; *Dorsey v. Clarke*, 5 Harr. & J. 551; *Gardiner Bank v. Wheaton*, 8 Greenl. 373; *Kelley v. Hill*, 50 Maine, 470; *Jackson v. Mills*, 13 John. 463; *Jackson v. Seeley*, 16 John. 197; *Malin v. Malin*, 1 Wend. 626; *Harder v. Harder*, 2 Sandf. Ch. 17; *Forsythe v. Clark*, 3 Wend. 638, 650; *Guthrie v. Gardner*, 19 Wend. 414; *White v. Carpenter*, 2 Paige, 218, 238; *Kellogg v. Wood*, 4 Paige, 579, 580; *Patridge v. Havens*, 10 Paige, 618; *Neale v. Hagthorpe*, 3 Bland, 551, 584; *Chaplin v. M'Affee*, 3 J. J. Marsh. 513, 515; *Runnels v. Jackson*, 1 Howard (Miss.), 358; *Powell v. Powell*, 1 Freem. Ch. 134; *Taliaferro v. Taliaferro*, 6 Ala. 404, 406; *Andrews v. Jones*, 10 Ala. 401, 420; *Thomas v. Walker*, 6 Humph. 93, 95; *Newell v. Morgan*, 2 Har. 225; *Cotton v. Wood*, 25 Iowa, 43; *Rigg v. Swann*, 6 Jones Eq. 118; *Millard v. Hathaway*, 27 Cal. 119; *Slaymaker v. St. John*, 5 Watts, 7; *Enos v. Hunter*, 4 Gilman, 211; *Brooks v. Fowle*, 14 N. H. 261; *Depeyster v. Gould*, 2 Green Ch. 474; *Barron v. Barron*, 24 Vt. 375; *Smith v. Burnham*, 3 Sumner, 438; *Pierce v. McKeegan*, 3 Barr, 136; *Lloyd v. Carter*, 17 Penn. St. 216; *Peebles v. Reading*, 8 Serg. & R. 484; *Kendall v. Mann*, 11 Allen, 15; *Verplank v. Caines*, 1 John. Ch. 57; *Scoby v. Blanchard*, 3 N. H. 170; *Elliott v. Armstrong*, 3 Blackf. 199; *Jennison v. Graves*, 3 Blackf. 441; *Blair v. Bass*, 4 Blackf. 540; *Byers v. Wackman*, 16 Ohio St. 440; *Cooper v. Skeel*, 14 Iowa, 578; 2 Dart V. & P. (4th Eng. ed.) 859; *Moore v. Moore*, 38 N. H. 382; *Poulet v. Johnson*, 25 Geo. 403; *Bryant v. Hendricks*, 5 Clarke (Iowa), 256. Long and unexplained delay in enforcing an alleged implied trust is a material circumstance, against its establishment, when parol evidence alone is re-

lied upon for the purpose. *Sunderland v. Sunderland*, 19 Iowa, 325; see *Nelson v. Worrall*, 20 Iowa, 469. In Michigan, a resulting trust in favor of a person who furnishes the purchase money for a deed of land, must appear from the face of the deed, and cannot be shown by parol. *Groesbeck v. Seeley*, 13 Mich. 329. Resulting trusts were abolished by statute, 1846. *Maynard v. Hoskins*, 9 Mich. 485.]

(*m*) *Gascoigne v. Thwing*, 1 Ver. 366; *Newton v. Preston*, Pre. C. 103; *Willis v. Willis*, 2 Atk. 71; 1 Atk. 60; *Amb. 414*; *Acherley v. Acherley*, 4 Bro. P. C. 67; *Smith v. Wilkinson*, 3 Ves. 705; 1 Dick. 328; *Lench v. Lench*, 10 Ves. 511; *Groves v. Groves*, 3 Yo. & Jer. 163; [*Richardson C. J. in Page v. Page*, 8 N. H. 187, 195; *Enos v. Hunter*, 4 Gilman, 211; *Carey v. Callan*, 6 B. Mon. 44; *Slocum v. Marshall*, 2 Wash. C. C. 397; *Hunter v. Marlboro*, 2 Wood. & M. 168; *Kendall v. Mann*, 11 Allen, 15, 17; *Botsford v. Burr*, 2 John. Ch. 409; *Cutler v. Tuttle*, 4 C. E. Green Ch. 549; *Peer v. Peer*, 3 Stockt. (N. J.) 432; *Clark v. Quackenbos*, 27 Ill. 260; *MacGregor v. Gardner*, 14 Iowa, 326; *Dudley v. Bachelder*, 53 Maine, 403; *Monroe v. Graves*, 23 Iowa, 597; *Brawner v. Staup*, 21 Md. 328; *Childs v. Griswold*, 19 Iowa, 362; *Holder v. Nunnally*, 2 Cold. (Tenn.) 288; *Stall v. Cincinnati*, 16 Ohio St. 169; *Kin-cell v. Feldman*, 22 Iowa, 363. And the burden of proof is on the party alleging the trust. *Noel v. Noel*, 1 Clarke (Iowa), 423.]

(*n*) *Skett v. Whitmore*, 2 Free. 289; *Newton v. Preston*, Pre. C. 103; *Cottingham v. Fletcher*, 2 Atk. 155; *Bartlett v. Pickersgill*, 4 East, 577, n. [It seems to be well established in the United States that parol evidence is admissible to show all the facts out of which a resulting trust

his right.(o) Where a conveyance is taken in the name of one person and the purchase money is paid by another, who borrows a portion of it from a third person, and no declaration of the trust for the latter is executed for some time, he may lose his security over the estate in consequence of judgments against the real purchaser, the borrower.(p)

11. So Lord Hardwicke laid it down that parol evidence might be admitted to show the trust, from the mean circumstances of the pretended owner of the real estate or inheritance, which makes it impossible for him to be the purchaser.(q) Where an estate was conveyed by the owner to another as a purchaser, although he was really only a trustee, it was held that the nominal seller could not by parol evidence alone make out a trust for himself,(q¹) but he would have a lien on the estate for the purchase money.(r)

arises, not only against the face of the deed itself, but in opposition to the answer of the trustee denying the trust. *Boyd v. M'Lean*, 1 John. Ch. 582; *Botsford v. Burr*, 2 John. Ch. 405; *Elliott v. Armstrong*, 2 Blackf. 199, 209; *Jennison v. Graves*, 2 Blackf. 441, 447; *Blair v. Bass*, 4 Blackf. 540, 545; *Page v. Page*, 8 N. H. 187, 195; *Moore v. Moore*, 38 N. H. 382; *Enos v. Hunter*, 4 Gilman, 211; *Buck v. Pike*, 2 Fairf. 9, 24; *Larkins v. Rhodes*, 5 Porter, 196, 207; *Swinburne v. Swinburne*, 28 N. Y. 568; *Lloyd v. Lynch*, 28 Penn. St. 419; *Letcher v. Letcher*, 4 J. J. Marsh. 590; *Vandever v. Freeman*, 20 Texas, 333; *Greer v. Baughman*, 13 Md. 257; *Farringer v. Ramsey*, 2 Md. 365; *Olive v. Dougherty*, 3 Iowa, 371; *Paine v. Wilcox*, 16 Wis. 202; *Miller v. Stokely*, 5 Ohio St. 194; 4 Kent (11th ed.), 306, in note; *White v. Sheldon*, 4 Nev. 280; *Brown v. Pitney*, 39 Ill. 468.]

(o) *Delane v. Delane*, 7 Bro. P. C. by T. 279; [*Clegg v. Edmonson*, 8 De G., M. & G. 787; *Graham v. Donaldson*, 5 Watts, 471; *Haines v. O'Conner*, 10 Watts, 315; *Lewis v. Robinson*, 10 Watts, 338; *Strimpfler v. Roberts*, 18 Penn. St. 283; *Peebles v. Reading*, 8 Serg. & R. 484; *Sunderland v. Sunderland*, 19 Iowa, 325.]

(p) *In re Cooke*, 6 Ir. C. Rep. 430, a very hard case. Compare the marginal note with the judgments. [Where a person purchases land in his own name with money borrowed of another under a promise to return it with interest or invest it in real estate, no implied trust is created in favor of the lender. *Gibson v. Foote*, 40 Miss. 788.]

(q) *Willis v. Willis*, 2 Atk. 71; *Ryall v. Ryall*, 1 Atk. 59, Amb. 413; *Lench v. Lench*, 10 Ves. 511. [See *Balbec v. Donaldson*, 2 Grant Cas. (Penn.) 459.]

(q¹) [The receipt of a consideration admitted in a deed cannot be contradicted for the purpose of raising a resulting trust for the grantor; *Graves v. Graves*, 29 N. H. 129; *Farrington v. Barr*, 36 N. H. 86; *Hogan v. Jaques*, 4 C. E. Green Ch. (N.

(r) *Leman v. Whitley*, 4 Russ. 423, *sed qu.* [See *ante*, 645, note. In reference to *Leman v. Whitley*, Mr. Justice Story said, in *Jenkins v. Eldredge*, 3 Story, 289: "I confess I never felt satisfied with that decision, and should have great difficulty in following it, even if there were no authorities which seem fairly to present grounds for doubt." See *Philbrook v. Delano*, 29 Maine, 413, 414.]

12. If there is some written evidence inconsistent with the fact that the supposed purchaser was the actual purchaser, evidence by parol is admissible to prove the truth of the transaction.^(s)

13. An express trust, although by parol only, will prevent the resulting trust; ^(t) and the resulting trust may be rebutted as to part of the land, or as to part of the interest in the land; ^(u) but the proof rests upon the claimant to show that the man from

J.) 123; or otherwise defeating the operation of the conveyance. *Farrington v. Barr*, 36 N. H. 86; *Philbrook v. Delano*, 29 Maine, 410; *ante*, 645, note. And although the conveyance, being absolute, appears to be voluntary, it raises no trust which can be enforced in favor of the grantor, even if aided by an oral agreement of the grantee to hold the premises for the benefit of the grantor. *Titcomb v. Morrill*, 10 Allen, 15; *Bartlett v. Bartlett*, 14 Gray, 277; *Philbrook v. Delano*, 29 Maine, 410; *Rathbun v. Rathbun*, 6 Barb. 105; *Miller v. Wilson*, 15 Ohio, 108; *Hutchins v. Lee*, 1 Atk. 447; *Young v. Peachy*, 2 Atk. 257; *Burn v. Winthrop*, 1 John. Ch. 329; *Balbec v. Donaldson*, 2 Grant Cas. (Penn.) 459; *Rasdall v. Rasdall*, 9 Wis. 379; *Russ v. Mebius*, 16 Cal. 350; *post*, 713, note.]

^(s) *Cripps v. Jee*, 4 Bro. C. C. 472; 4 Russ. 426, 427. [See *Jenkins v. Eldredge*, 3 Story, 289; *Morris v. Nixon*, 17 Peters (U. S.), 109; S. C. 1 How. (U. S.) 118; *Rathbun v. Rathbun*, 6 Barb. 107, 108; *Carter v. Palmer*, 11 Bligh, 397, 418, 419; *Reid v. Reid*, 12 Rich. Eq. (S. Car.) 213; *Sieman v. Austin*, 33 Barb. 9.]

^(t) *Ly. Bellasis v. Compton*, 2 Ver. 294; *Ld. Altham v. Ld. Anglesea*, Gilb. E. R. 16; *Roe v. Popham*, Doug. 25; *Langfield v. Hodges*, Lofft, 230; *Rider v. Kidder*, 10 Ves. 360; *Taylor v. Alston*, Watk. Cop. 216, MS.; *Goodright v. Hodges*, *Ib.* 227; *Lofft*, 230; 2 East, 534, n.; *Maddison v. Andrew*, 1 Ves. 57; *Edwards v. Edwards*, 2 Yo. & Col. 123. [And so for a stronger reason if there be a trust declared in writing at the time of

the transaction, there can be no resulting trust. *Austin v. Brown*, 6 Paige, 448; *Leggett v. Dubois*, 5 Paige, 114; *Alexander v. Warrance*, 17 Missou. 230; *Mercer v. Stark*, 1 Sm. & M. 479; *Clark v. Burnham*, 2 Story, 1; *Dennison v. Goehring*, 7 Barr, 175; *Ring v. McCoun*, 10 N. Y. 268.]

^(u) *Benbow v. Townsend*, 1 My. & Ke. 506; *Crop v. Norton*, 9 Mad. 233; per *Ld. Hardwicke*, *semble contra*; but *Wray v. Steel*, 2 Ves. & Bea. 388, acc.; see *James v. Price*, 3 Bligh, N. S. 419; *Sugd. H. of L.* 666; [*Pinney v. Fellows*, 15 Vt. 525. A resulting trust may be rebutted or discharged by parol evidence. *Page v. Page*, 8 N. H. 187; *Botsford v. Burr*, 2 John. Ch. 405, 416; *Steere v. Steere*, 5 John. Ch. 1; *Squire v. Harder*, 1 Paige, 494, 495; *Philips v. Crammond*, 2 Wash. C. C. 441; *White v. Carpenter*, 2 Paige, 218, 265; *M'Guire v. M'Gowen*, 4 Desaus. 487; *Elliott v. Armstrong*, 2 Blackf. 199, 213; *Jackson v. Feller*, 2 Wend. 465; *Malin v. Malin*, 1 Wend. 625; *Garrick v. Taylor*, 29 Beav. 79; *Baker v. Vining*, 30 Maine, 126; *Creed v. Lancaster Bank*, 1 Ohio St. 1; *Hays v. Hollis*, 8 Gill, 369; *Myers v. Myers*, 25 Penn. St. 100; *Sewell v. Baxter*, 2 Md. Ch. 447; 2 Story Eq. Jur. § 1202; *Perkins v. Nichols*, 11 Allen, 545; *Maddison v. Andrew*, 1 Ves. sen. 58; *Cutler v. Tuttle*, 4 C. E. Green Ch. 549; *Smith v. Howell*, 3 Stockt. (N. J.) 349; *Peer v. Peer*, 3 Stockt. (N. J.) 432; *Bayles v. Baxter*, 22 Cal. 575; *Edwards v. Edwards*, 39 Penn. St. 369; *Graves v. Graves*, 3 Met. (Ky.) 167.]

whom the consideration moved did not mean to purchase in trust for himself, but intended a gift to the stranger.(x)

* 14. Where upon a purchase of property, the purchaser takes the transfer in the names of himself and another, and he dying first, the legal right survives to the joint tenant, the circumstance that the purchaser received the rents for his life, for example, would not be conclusive against the equitable right by survivorship, for in the case of purchases in joint names there may be partial trusts — trusts affecting part of the interest in the property purchased and not extending to the whole interest in the property — a trust, for instance, in the purchaser during his life and not beyond it. The trust might be so declared, and if it be satisfactorily proved that such was the intention, the court will give effect to it.(y)

15. Where a man merely employs another person by parol, as an agent to buy an estate, who buys it for himself and denies the trust, *and no part of the purchase money is paid by the principal*, and there is no written agreement, he cannot compel the agent to convey the estate to him, as that would be directly in the teeth of the statute of frauds; (z) even if the agent be afterwards convicted of perjury in denying the trust.(a)

(x) 3 Ridg. P. C. 178; [Dudley v. Bosworth, 10 Humph. 12.]

(y) Garrick v. Tayler, 7 Jur. N. S. 1174.

(z) Bartlett v. Pickersgill, Bur. 2255; 4 East, 577, n. (b); 1 Ed. 515; see Rastel v. Hutchinson, 1 Dick. 44; Braddock v. Derisley, 1 Fost. & Fin. 60, where one man bought and another completed the purchase; see Lincoln v. Wright, 4 De G. & J. 16; Inskip's case, 3 Giff. 359, where the alleged agent completed the purchase in his own name; [2 Story Eq. Jur. § 1201 a; Smith v. Burnham, 3 Sumner, 462; Botsford v. Burr, 2 John. Ch. 405; Freeman v. Kelly, 1 Hoff. Ch. 90; Pinnock v. Clough, 16 Vt. 501, 506, 509; Dorsey v. Clarke, 4 Harr. & J. 551, 557; Thompson v. Branch, 1 Meigs, 390; Ensley v. Balentine, 4 Humph. 233; Kennedy v. Keating, 34 Missou. 25; Peebles v. Reading, 8 Serg. & R. 492; Jackson v. Ringland, 4 Watts & S. 149, 150; Walker

v. Brungard, 13 Sm. & M. 765; Taliaferro v. Taliaferro, 6 Ala. 406; Moore v. Green, 3 B. Mon. 407; Murphy v. Nathans, 46 Penn. St. 508; Astreen v. Flanagan, 3 Edw. Ch. 279; Baker v. Leathers, 3 Ind. 558. But if one undertakes to procure a deed of land for another who pays the consideration therefor in accordance with a previous agreement, but fraudulently takes the conveyance to himself, such agent may be compelled by bill in equity to convey the land to him who made the contract and paid the consideration. Pillsbury v. Pillsbury, 17 Maine, 107; see Sweet v. Jacocks, 6 Paige, 355; Perkins v. Hayes, 1 Cooke, 166; Jenkins v. Eldredge, 3 Story, 289, 290; Chastain v. Smith, 30 Geo. 96; Brown v. Dwelley, 45 Maine, 52; Wells v. Robinson, 13 Cal. 133; Ferguson v. Williamson, 20 Ark. 272; Hocker v. Gentry, 3 Met. (Ky.) 463; Wales v. Newbould, 9 Mich. 45.]

(a) The King v. Boston, 4 East, 572;

Where the Purchase is in the Name of a Child.

16. If a father purchase in the name of a child, although a female,(b) or illegitimate,(c) who is without a provision,(d) or in the joint names of such a child and of another person,(e) it will not be deemed a resulting trust for the father, but a gift or advancement for the child.(f) And if the father die without having paid all the purchase money, his personal estate must pay it for the benefit of his child.(g) And even where, by the custom of a manor, copyholds are granted for lives *successive*, if the father pay the fine, a grant to children, as nominees, will be an advancement; (h) nor is *it material that the purchase is of a reversion expectant upon the death of a stranger.(i) But such a purchase for an indirect purpose, *e. g.* as a holder of shares in a public company, would receive a different construction.(k)

17. The child must be unadvanced; but an advancement in

Fell v. Chamberlain, 2 Dick. 484; *The King v. Dalby*, Peake, 12, and cases cited in the note.

(b) *Lady Gorge's case*, 3 Cro. 550, cited; *Gilb. Lex. Præ.* 272, *contra*; *Bone v. Pollard*, 24 Beav. 283.

(c) *Beckford v. Beckford*, Loft, 490; *Fearne Posth.* 327; *Fonb. n.* (1), 2 Trea. Eq. (2d ed.) 127; *Soar v. Foster*, 4 K. & J. 152; [*Kimmel v. McRight*, 2 Barr. 38; *Lewin Trusts* (5th Eng. ed.), 145.]

(d) *Elliot v. Elliot*, 2 Ch. C. 231; *Rep. t. Finch*, 341.

(e) *Lamplugh v. Lamplugh*, 1 P. Wms. 112.

(f) *Ly. Gorge's case*, 3 Cro. 550; *Ld. Grey v. Ly. Grey*, 1 Ch. C. 296; 2 Swan. 594; *Mumma v. Mumma*, 2 Ver. 19; *Shales v. Shales*, 2 Free. 252; 1 Eq. Ca. Ab. 382, pl. 9; *Anon.* 2 Free. 128, pl. 151; *Taylor v. Taylor*, 1 Atk. 386; *Hill v. Gomme*, 1 Beav. 540; [2 Story Eq. Jur. §§ 1202, 1203; *Page v. Page*, 8 N. H. 187; *Partridge v. Havens*, 10 Paige, 618, 626; *Astreen v. Flanagan*, 3 Edw. Ch. 229; *Stanley v. Brannon*, 6 Blackf. 194, 195; *Dennison v. Goehring*, 7 Barr. 180, 182; *Bodine v. Edwards*, 10 Paige, 504;

Knouff v. Thompson, 16 Penn. St. 357; *Dudley v. Bosworth*, 10 Humph. 12; *Alexander v. Warrance*, 17 Miss. 228; *Fatheree v. Fletcher*, 31 Miss. 265; *Cartwright v. Wise*, 14 Ill. 417; *Tremper v. Burton*, 18 Ohio, 418; *Whitten v. Whitten*, 3 Cush. 194; *Jackson v. Matsdorf*, 11 John. 91; *Welton v. Divine*, 20 Barb. 9; *Douglass v. Price*, 4 Rich. Eq. 322; *Lewin Trusts* (5th Eng. ed.), 139, & cases cited; *Lee v. Flood*, 17 Jur. 544; 2 Dart V. & P. (4th Eng. ed.) 852, 853; *Shaw v. Read*, 47 Penn. St. 96.]

(g) *Redington v. Redington*, 3 Ridg. P. C. 106; *Redington v. Redington*, 9th July, 1805, Printed Cases, H. of L. [And see *Skidmore v. Bradford*, L. R. 8 Eq. 134.]

(h) *Skeats v. Skeats*, 2 Yo. & Col. C. C. 9; *Dyer v. Dyer*, Watk. Cop. 216; [S. C. 2 Cox, 94;] *Swift v. Davis*, 8 East, 354, n.; *Right v. Bawden*, 3 East, 260; *Smartle v. Penhallow*, Ld. Ray. 994; *Jeans v. Cooke*, 24 Beav. 513.

(i) *Finch v. Finch*, 15 Ves. 43.

(k) *Reid's case*, *Maxwell's case*, 24 Beav. 318, 321.

part is not material, *(l)* and a child having only a reversion expectant upon a life-estate, will be considered as unadvanced; *(m)* and even if the child be advanced, yet if the father consider him unadvanced, that will be sufficient. *(n)* If the child is already provided, for and the father did not consider him unadvanced, *(o)* or if the father consider the child, from the first, as a trustee for him, he will be held to be so. *(p)* A surrender by the father to the use of his will immediately after the grant, would make the son a trustee for the father. *(q)* But the proof of this lies on the side of the person wishing to defeat the child's claim; and it seems, that although parol evidence of verbal declaration is admissible in support of the deed, it is inadmissible to create a trust against it. *(r)*

18. Possession by the father, during the infancy of his child, *(s)* will not be deemed subversive of the child's claim. So the circumstance of the parent laying out money in repairs and im-

(l) Rep. *t. Finch*, 341; [*Lewin Trusts* (5th Eng. ed.), 142.]

(m) *Lamplugh v. Lamplugh*, 1 P. Wms. 111.

(n) *Redington v. Redington*, *ubi sup.*

(o) *Eliot v. Elliot*, 2 Ch. C. 231. [See *Lewin Trusts* (5th Eng. ed.), 141.]

(p) *Woodman v. Morrell*, 2 Free. 32; *Swift v. Davis*, 8 East, 354, n.; *Murless v. Franklin*, 1 Swan. 13; *Scawin v. Scawin*, 1 Yo. & Col. C. C. 65; *In re Collinson*, 3 De G., M. & G. 409. [See *Jackson v. Matsdorf*, 11 John. 91, 96.]

(q) *Prankerd v. Prankerd*, 1 Sim. & Stu. 1; *Swift v. Davis*, 8 East, 354, n.; *Sidmouth v. Sidmouth*, 2 Beav. 447.

(r) *Shales v. Shales*, 2 Free. 252; *Lamplugh v. Lamplugh*, 1 P. Wms. 111; *Taylor v. Taylor*, 1 Atk. 386; *Redington v. Redington*, 3 Ridg. P. C. 106; *Kilpin v. Kilpin*, 1 My. & Ke. 520; [*Lewin Trusts* (5th Eng. ed.), 144. The advancement of the child is a mere question of intention, and, therefore, facts antecedent to or contemporaneous with the purchase, or so immediately after it as to constitute a part of the same transaction, may properly be put in evidence for the purpose of rebutting the presumption that a provision

was intended. *Lewin Trusts* (5th Eng. ed.), 143, 144; 1 Lead. Cas. in Eq. (3d Am. ed.) 257 [165] *et seq.* notes to *Dyer v. Dyer*; 2 Story Eq. Jur. § 1202; *Sidmouth v. Sidmouth*, 2 Beav. 447; *Christy v. Courtenay*, 13 Beav. 96; *Jeans v. Cook*, 24 Beav. 513; *Williams v. Williams*, 32 Beav. 370; *Tucker v. Burrow*, 2 H. & M. 524; 2 Dart V. & P. (4th Eng. ed.) 854; *Mut. Ins. Co. v. Deal*, 18 Md. 26; *Russ v. Mobius*, 16 Cal. 350. Of course the father cannot defeat the advancement by any subsequent declaration of intention. *Williams v. Williams*, 32 Beav. 370; *Eliot v. Elliot*, 2 Ch. Cas. 221; *Christy v. Courtenay*, 13 Beav. 96; *Tremper v. Burton*, 18 Ohio, 418. But his evidence is admissible for the purpose of proving what was the intention at the time. *Devoy v. Devoy*, 3 Sm. & Gif. 403; *Lewin Trusts* (5th Eng. ed.), 144.]

(s) *Finch*, 340, 341; *Lamplugh v. Lamplugh*, 1 P. Wms. 112; *Mumma v. Mumma*, 2 Ver. 19; *Redington v. Redington*, 3 Rid. P. C. 106; *Atty. Gen. v. Bagg*, Hard. 135, turned on fraud; *King v. Denison*, 1 Ves. & Bea. 260; *Alleyne v. Alleyne*, 2 J. & L. 544.

provements will not make the child a trustee; (t) and even the receipt by the father of the profits after the child's coming of age cannot be depended upon against the child's claim. (u)

19. A declaration of trust by the father, *subsequently* to the conveyance, will not divest the gift to the child, (x) and therefore a devise by him of the estate will be inoperative, (y) but a case of election may now be raised against him, notwithstanding the early case of *Shales v. Shales*. (z)

20. If the conveyance of the fee to a son is proved to be for a particular * purpose, as to sever a joint tenancy, the child will be a trustee for the father. (a)

21. A purchase by a father, in the joint names of *himself* and son, will be considered as an advancement for the child, if he is unprovided for; and consequently equity will not assist to defeat his legal claim. (b) Lord Hardwicke considered this a weak case for advancement, (c) and accordingly, (d) where a father purchased an estate in the names of himself and son, and had *no other estate* to which a judgment creditor could resort, the creditor was relieved in equity against the survivorship at law; the settlement being considered as voluntary and fraudulent against creditors. But there does not appear to be much weight in the objections which have been raised. A moiety of some estates may be a much better provision than the entirety of others. The chance of survivorship which the father takes is an incident to the tenancy,

(t) *Shales v. Shales*, 2 Free. 252; *Mumma v. Mumma*, 2 Ver. 19.

(u) *Grey v. Grey*, Finch, 340; *Christy v. Courtenay*, 13 Beav. 96; see *Lloyd v. Read*, 1 P. Wms. 608; *Gilb. L. Præ.* 271. [The fact that the parent remained in uninterrupted possession for fifty years, claiming title under a written agreement, under which the possession had been taken, was held a conclusive rebuttal of the presumption of advancement. *Peer v. Peer*, 3 Stockt. (N. J.) 432.]

(x) *Woodman v. Morrell*, 2 Free. 32; *Elliot v. Elliot*, 2 Ch. C. 231; *Redington v. Redington*, 3 Rid. P. C. 106.

(y) *Mumma v. Mumma*, 2 Ver. 19; *Dyer v. Dyer*, Watk. Copy. 216; *Crabb v. Crabb*, 1 My. & Ke. 511.

(z) 2 Free. 252.

(a) *Baylis v. Newton*, 2 Ver. 28; *Birch v. Blagrove*, Amb. 264; *Raleigh's case*, Hard. 497. [Where a son procures a deed of land paid for by his parent to be made to himself without the consent of his parent, he cannot hold the land as an advancement. *Peer v. Peer*, 3 Stockt. (N. J.) 432.]

(b) *Scroope v. Scroope*, 1 Ch. C. 27; *Crabb v. Crabb*, 1 My. & Ke. 511; see *Stileman v. Ashdown*, 2 Atk. 477; *Pole v. Pole*, 1 Ves. 76; *Devoy v. Devoy*, 3 Sm. & Gif. 403; [Lewin Trusts (5th Eng. ed.), 140; to the extent of one half of the estate. *Thompson v. Thompson*, 1 Yerger, 97, 99.]

(c) 2 Atk. 480; see *Pole v. Pole*, 1 Ves. 76.

(d) *Stileman v. Ashdown*, 2 Atk. 477.

and extends equally to the son, who, after he attains his majority, may sever the joint tenancy. If he die during his minority, it is as well that the estate should survive to the father, who paid the purchase money, and perhaps took the conveyance to himself and son as joint tenants, with the express view of advancing him only in the event of his attaining that age at which the law considers a man capable of managing his fortune. During the son's minority and the life of his father, upon whom should he be dependent if not upon his own parent? If the father die during the son's minority, the estate will survive to him; so that, perhaps, it is impossible to contend that a purchase by a parent in the name of himself and child, as joint tenants, is not as strong a case for an advancement as a purchase in the name of the child solely. Fraud is of course an exception to every rule.

22. A purchase in the name of a child solely, or jointly with the parent's name, is not, however, within the 27 Eliz.,(e) and therefore a subsequent purchaser, although *bonâ fide*, will not be relieved against it.(f) Whether such a purchase falls within the 12 & 13 Vict. c. 106, s. 126, although the bankrupt is *at the time insolvent*, may be made a question.(1)

* 23. If the father be dead, a purchase by the grandfather, in the name of his grandchild, is subject to the same rules as govern a purchase by a father in the name of his child.(g)

(e) C. 4.

(f) *Ly. Gorge's case*, 3 Cro. 550, cited.

(g) *Ebrand v. Dancer*, 2 Ch. C. 26; *Lloyd v. Read*, 1 P. Wms. 608; *Soat v. Foster*, 4 K. & J. 152; [*Tucker v. Barrow*, 2 Hem. & M. 525; so a nephew who had been adopted as a son; *Currant v. Jago*, 1 Coll. 261; *Jackson v. Feller*, 2 Wend. 465, 469; but it seems the advancement will not be presumed in favor of a more remote relation, and *à fortiori* not of a stranger, though the real purchaser may have placed himself *loco parentis*. *Lewin Trusts* (5th Eng. ed.), 146; see *Tucker v.*

Barrow, 2 Hem. & M. 515. But see 2 *Dart V. & P.* (4th Eng. ed.) 853; *Skidmore v. Bradford*, L. R. 8 Eq. 134. The doctrine of advancement does not apply to the case of a mother purchasing stock in the name of her child. *Re De Visme*, 2 De G., J. & Sm. 17. Nor where the nominal grantee is merely a brother or sister of the person furnishing the purchase money. *Maddison v. Andrew*, 1 Ves. 58; *Foster v. Foster*, 34 L. J. Ch. 428; *Edwards v. Edwards*, 39 Penn. St. 369; *Field v. Lonsdale*, 14 Jur. 995;

(1) Compare 1 Jac. 1, c. 15, s. 5 (*Walker v. Burrows*, 1 Atk. 93; *Fryer v. Flood*, 1 Bro. C. C. 160; *Glaister v. Hewer*, 8 Ves. 195; and consult *Crisp v. Pratt*, Cro. Ca. 541; *Lilly v. Osborn*, 3 P. Wms. 298; *Maguire v. Nicholson*, Beat. 592), with 6 Geo. 4, c. 16, s. 73, now repealed; and 12 & 13 Vict. c. 106, s. 126, not repealed by 24 & 25 Vict. c. 134, Sched. G.

24. So a purchase by a husband in the name of his wife is also deemed an advancement and provision for her.^(h) But if a purchase in the name of wife or child be voluntary, it may be fraudulent as against creditors,⁽ⁱ⁾ within the operation of the statute of 13 Eliz.(1) It was doubtful whether a *purchase* was within the

Keaton v. Cobb, 1 Dev. Ch. 439; Perry Trusts, § 144.]

(h) Kingdome v. Bridges, Back v. Andrews, 2 Ver. 67, 120. [Where a husband purchases land, and the deed is taken to his wife, *primâ facie* no trust results in his favor. Dickinson v. Davis, 43 N. H. 647; 2 Story Eq. Jur. § 1204; Sunderland v. Sunderland, 19 Iowa, 325; Guthrie v. Gardner, 19 Wend. 414; Jencks v. Alexander, 11 Paige, 619; Wallace v. Bowens, 28 Vt. 638; Alexander v. Warrance, 17 Miss. 228; Kline's Appeal, 39 Penn. St. 463; Garfield v. Hatmaker, 15 N. Y. 475; Welton v. Divine, 20 Barb. 9; Astreen v. Flanagan, 3 Edw. Ch. 279; Whitten v. Whitten, 3 Cush. 197; Perkins v. Nichols, 11 Allen, 545; Hill v. Pine River Bank, 45 N. H. 308; Shepherd v. White, 10 Texas, 72; Butler v. Ins. Co. 14 Ala. 777; Proseus v. McIntire, 5 Barb. 425. A purchase of land by a husband with his wife's money, in the name of the husband, is deemed to be in trust for her. Meth. Epis. Church v. Jaques, 1 John. Ch. 450.]

(i) Christ's Hosp. v. Budgin, 2 Ver.

683; Lush v. Wilkinson, 5 Ves. 384; Dewey v. Baynton, 6 East, 257; Ly. Arundell v. Phipps, 10 Ves. 139; Jezeph v. Ingram, 8 Taunt. 838; Latimer v. Batson, 4 B. & C. 652; Martindale v. Booth, 3 B. & Ad. 498; 19 Ves. 493; [Skarf v. Soulby, 1 Mac. & G. (Am. ed.) 364, note (2), where this subject is discussed and the cases cited; Jencks v. Alexander, 11 Paige, 619; Guthrie v. Gardner, 19 Wend. 414; Creed v. Lancaster Bank, 1 Ohio St. 1; Elliott v. Hart, 10 Ala. 348; Abney v. Kingsland, 10 Ala. 355; Belford v. Crane, 1 C. E. Green (N. J.), 265; Crozier v. Young, 3 Monroe, 158; Rucker v. Abell, 8 B. Mon. 566; Kimmel v. McRight, 2 Barr, 38; Gowing v. Rich, 1 Ired. 553; Demaree v. Driskill, 3 Blackf. 115; Newell v. Morgan, 2 Harr. 325, 329; Brown v. McDonald, 1 Hill Ch. 297; Doyle v. Sleeper, 1 Dana, 531; Hunt v. Booth, 1 Free. 215; Bell v. Hallenback, Wright, 751; Bodine v. Edwards, 10 Paige, 504; Brewster v. Power, 10 Paige, 563, 568; Wait v. Day, 4 Denio, 439.]

(1) 13 Eliz. c. 5 (29 Eliz. c. 5), makes void fraudulent conveyances against creditors but it saves all interests under conveyances made upon good consideration and *bonâ fide*, to any person without notice of the fraud; s. 6, Twyne's case, 3 Rep. 80; Owen v. Body, 5 Ad. & El. 28; Townsend v. Westacott, 2 Beav. 340, 4 Beav. 58; Christy v. Courtenay, 13 Beav. 96; Goldsmith v. Russell, 5 De G., M. & G. 547; Bott v. Smith, 21 Beav. 511; Holmes v. Penney, 3 K. & J. 90; Arraman v. Corbett, 1 J. & H. 410; Thompson v. Webster, 7 Jur. N. S. 531; S. C. 4 De G. & J. 600. As to a conveyance for creditors, see Siggers v. Evan, 5 E. & B. 367; Lee v. Green, 25 L. J. N. S. 269, 6 De G., M. & G. 155. A sale for good consideration is not void because it was made for the purpose of defeating an execution of a judgment creditor; Wood v. Dixie, 7 Q. B. 892; Darvill v. Terry, 6 H. & N. 807; see Marlow v. Orgill, 8 Jur. N. S. 829; but a voluntary conveyance to defeat the plaintiff in an action is void, Barling v. Bishopp, 29 Beav. 417. Being indebted is not sufficient to invalidate the settlement, but it is not necessary to prove that the settlor was indebted to the extent of insolvency; Townsend v. Westacott, 2 Beav. 340; Christy v. Courtenay, 13 Beav. 96; but the party must be indebted at the time of the settlement; Skarf v. Soulby, 1 Mac.

latter statute, unless there was a fraud; (*k*) but a purchase followed by a conveyance by the purchaser's direction to trustees for his wife and children, has been held to be within this statute. (*l*) And it seems now to be considered that as money and bank notes can be taken in execution under the 1 & 2 Vict. c. 110, a person largely indebted could not pass over to a child either money or bank notes, for the purpose of making a purchase, or if he did, his creditors might follow the money into the land or stock, or whatever else had been purchased therewith; and from this, it is supposed to follow that a purchase by a father, in the name of a child, would not be sustained against creditors, if the gift of the purchase money to the child could not have been supported * against them. (*m*) Although a conveyance be made to the husband as the purchaser, it may be proved that the money was the wife's separate estate, and that the purchase was made for her benefit. (*n*) Where a woman contracted to buy an estate, and afterwards married, and part of the purchase money was paid by her husband, and he took a conveyance to himself, it was held that the wife was entitled to the estate, subject to a charge in favor of her husband. (*o*) But no presumption arises in favor of a wife who was the deceased wife's sister, and whose marriage took place since the act rendering such marriages void. (*p*)

25. A purchase by a *trader* in the name of his wife seems subject to the same rules as a purchase by a trader in the name of his child. (*q*) But a purchase by a trader of the land tax on

(*k*) *Fletcher v. Sidley*, 2 Ver. 490; *Proc- Scales v. Baker*, 28 Beav. 91; purchase
tor v. Warren, Sel. C. C. 78; 8 Ves. 199; with produce of joint investment.
[*Jencks v. Alexander*, 11 Paige, 619.] (*o*) *Maddison v. Chapman*, 1 J. & H.

(*l*) *Barton v. Vanheythuysen*, 11 Hare, 470.
126.

(*m*) *Barrack v. McCulloch*, 3 K. & J. (*p*) *Soar v. Foster*, 4 K. & J. 152.
110, consider the case. (*q*) *Glaister v. Hewer*, 8 Ves. 195; 9

(*n*) *Darkin v. Darkin*, 17 Beav. 578; 1 My. & Cra. 53; see now 24 & 25 Vict. c. 134.

& G. 364, [Am. ed. note 2.] A subsequent creditor may claim against the settlement if any of the antecedent debts remain unsatisfied; *Jenkyn v. Vaughan*, 3 Drew. 419. But a creditor who has assisted in the preparation of the deed, and in the execution of the trusts, cannot impeach the deed; *Olliver v. King*, 1 Jur. N. S. 1066; 4 Week. Rep. 382, reversed; see 8 De G., M. & G. 110. A contingent annuity secured to the seller's wife upon a sale by an insolvent of his business, &c., was held to be void against creditors without disturbing the sale; *French v. French*, 6 De G., M. & G. 95; *Wakefield v. Gibbon*, 1 Giff. 401.

his wife's estate, for her benefit,^(r) or of an enfranchisement of his wife's copyhold estate, or money laid out by him in building on her estate, cannot be made a ground of charge against her or her estate by his creditors, although he was insolvent at the time.^(s)

SECTION II.

OF PURCHASES WITH TRUST MONEY: AND OF THE PERFORMANCE OF A COVENANT TO PURCHASE AND SETTLE AN ESTATE.

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| <ol style="list-style-type: none"> 1. Purchase by trustee or executor with assets in his own name. 2. Parol evidence. 3. If bound to invest in land, presumption accordingly. — Unless he claimed the money. — Purchase by executor of mortgagee of equity of redemption. 4. Purchase by person who has agreed to purchase and settle lands, a performance. — Although purchase only partial. 5. Or trustees were to buy. — Or consent required. | <ol style="list-style-type: none"> 6. Lands and money taken in exchange liable. 7. Where descended lands go in performance of covenant. 8. } What estates will satisfy the covenant. 9. } 10. Improper investment may be followed. 11. Value how to be taken. 12. Additional sum invested: improvements an advancement. 13. Where covenant is a lien. 14. Where a covenant to settle is confined to an existing contract to purchase. 15. Renewals, &c., by trustees. |
|---|---|

1. If a trustee, or executor, purchase estates with his trust money or assets, and take the conveyance in his own name, without the *trust appearing on the face of the deeds, the estates will not be liable to the trusts, although he die insolvent, unless the application of the purchase money can be clearly proved. And the same principle applies to a purchase by a husband with trust money belonging to his wife, of which he may have obtained possession from the trustee, whether with or without the wife's consent; (^a¹) or to a purchase by an agent or

(^r) Burrough's case, 17 Ves. 267. wise, 1 Sandf. Ch. 214; Lathrop v. Gilbert, 2 Stockt. Ch. 345; Raybold v. Raybold, 20 Penn. St. 308; Davis v. Davis, 46 Penn. St. 342; Kline's Appeal, 39 Penn. St. 463; Fillman v. Divers, 31 Penn. St. 429; Resor v. Resor, 9 Ind. 347.

(^s) *Campion v. Cotton*, 17 Ves. 263; see *Frazier v. Thompson*, 5 Jur. N. S. 669.

(^a¹) [*The Meth. Epis. Church v. Jaques*, 1 John. Ch. 450; *S. C.* 3 John. Ch. 77; *Pinney v. Fellows*, 15 Vt. 325; *Barron v. Barron*, 24 Vt. 375; *Dickinson v. Cod-*

steward with moneys remitted to him by his principal.(a) If the trust money is traced, the *cestuis que trust* may claim either the property purchased or the money.(a²)

2. Parol evidence of the investment of the trust money is admissible either in the lifetime, or after the decease of the trustee: but mere parol evidence of declarations made by the purchaser will be received with great caution.(b)

3. Where a trustee or agent is bound by the trust to lay out the money in land, a purchase will be presumed to have been made in execution of the trust,(c) unless he considered himself entitled to the trust money.(d) And where an executor of a mortgagee for a term of years purchased the equity of redemp-

(a) Bennet v. Mayhew, 1 Bro. C. C. 232; 2 Bro. C. C. 287; Deg v. Deg, 2 P. Wms. 414; Kirk v. Webb, Heron v. Heron, Halcot v. Markant, Pre. C. 84, 163, 168; Kendar v. Milward, 2 Ver. 440; Pre. C. 171; Cox v. Bateman, 2 Ves. 19; Anon. Sel. C. C. 57; Lane v. Dighton, Amb. 409; Balgney v. Hamilton, *Id.*; Ryall v. Ryall, 1 Atk. 59; Amb. 413; Ld. Plymouth v. Hickman, 2 Ver. 167; Birds v. Askey, 24 Beav. 618. [See *ante*, 703, note; Church v. Sterling, 16 Conn. 388; Day v. Roth, 18 N. Y. 448; Moffatt v. McDonald, 11 Humph. 457; Chastain v. Smith, 30 Geo. 96; Eshleman v. Lewis, 49 Penn. St. 410; Bridenbecker v. Lowell, 32 Barb. 10; Follansbe v. Kilbreth, 17 Ill. 522.]

(a²) [2 Story Eq. Jur. §§ 1210, 1260; Boyd v. McLean, 1 John. Ch. 582, 587, 588; Murray v. Lilburn, 2 John. Ch. 442, 443; Wallace v. Duffield, 2 Serg. & R. 521; Kisler v. Kisler, 2 Watts, 323; The Harrisburg Bank v. Tyler, 3 Watts & S. 373; Wilhelm v. Folmer, 6 Barr, 296; Kirkpatrick v. McDonald, 11 Penn. St. 393; Oliver v. Piatt, 3 How. (U. S.) 401; Seaman v. Cook, 14 Ill. 301; Williams v. Hollingsworth, 1 Strobb. Eq. 103; Garrett v. Garrett, 1 Strobb. Eq. 96; Freeman v. Kelly, 1 Hoff. Ch. 90, 94; Story J. in Smith v. Burnham, 3 Sumner, 462; Philips v. Crammond, 2 Wash. C. C. 441, 445; Turner v. Pettigrew, 6 Humph. 439; The Meth. Epis. Church v. Jaques, 1

John. Ch. 450; Moffatt v. McDonald, 11 Humph. 437; Valle v. Keese, 13 Texas, 187; Lewin Trusts (5th Eng. ed.), 645, 647, 648; 2 Dart V. & P. (4th Eng. ed.) 861; Porter v. Bank of Rutland, 19 Vt. 410; 4 Kent (11th ed.), 306; Bancroft v. Consen, 13 Allen, 50; Blaisdell v. Stevens, 16 Vt. 179; Johnson v. Dougherty, 3 C. E. Green (N. J.), 406; Wilkinson v. Wilkinson, 1 Head (Tenn.), 305; Clausen v. La Franz, 1 Clarke (Iowa), 226; Day v. Roth, 18 N. Y. 448; McLarren v. Brewer, 1 Maine, 402; Harper v. Archer, 28 Miss. 212; Thompson's Appeal, 22 Penn. St. 16; Sallee v. Croft, 7 Rich. Eq. 34; Kaufman v. Crawford, 9 Watts & S. 634.]

(b) Lench v. Lench, 10 Ves. 511; Wilson v. Foreman, 2 Dick. 593, as corrected, 10 Ves. 519; Anon. Sel. C. C. 57.

(c) Manningford v. Toleman, 1 Col. 670; Phayre v. Perce, 3 Dow, 116; Sugd. H. of L. 160; [Mathias v. Mathias, 3 Sm. & Gif. 252.]

(d) Perry v. Phelps, 4 Ves. 108; 17 Ves. 173; Cox v. Paxton, 17 Ves. 329; Savage v. Carroll, 1 Bal. & Beat. 265. Where the *cestui que trust* shall only have a charge on the purchased estate, see Lewis v. Madocks, 8 Ves. 150; 17 Ves. 48; Denton v. Davies, 18 Ves. 499; Nee-som v. Clarkson, 4 Hare, 97; Wadham v. Rigg, 10 W. R. 365; Williams v. Thomas, 8 Jur. N. S. 250; Lady Mornington v. Keane, 2 De G. & J. 292.

tion in fee for a small sum in his own name, and for his own benefit, he was held to be a trustee of the fee for the benefit of his testator's estate.^(e)

4. Where a man covenants to purchase and settle, or, having no real estate, to *convey* and settle lands, the covenant may be enforced as between even his representatives; (f) and if he afterwards accordingly purchases lands of equal or greater value, but neglects to settle them, they will be held to have been purchased with an intent to perform the covenant, and will accordingly go in performance of it, (g) and the heir must give up the estate, although he is not the person entitled to the benefit of the covenant. (h) And lands of insufficient value will go in part performance of the covenant as far as * they will extend. (i) But he will not be allowed for any expenditure not warranted by his covenant or by the trust, *e. g.* the cost of erecting a mansion. (k)

5. The like principle extends to a covenant to *pay* the money to *trustees*, to be by them laid out in the purchase of estates.^(l) And it is not material that the purchase was to be made with the consent of third persons,^(m) or within a limited time.⁽ⁿ⁾ Nor that there was a subsisting mortgage on the estate, upon which the covenantor took up money from another person in order to enable him to complete the purchase,^(o) or that the covenantor had an option to settle a rentcharge instead of the

(e) *Fosbrooke v. Balguy*, 1 My. & Ke. 1 Bro. C. C. 582; 4 Ves. 116, 117; 10 Ves. 9, 516; *Gardner v. Ld. Townshend*, 226, the marginal abstract not correct.

(*f*) *Lechmere v. Ld. Carlisle*, 3 P. Wms. 211; *Barham v. Ld. Clarendon*, 10 Hare, 136; *Mathias v. Mathias*, 3 Sm. & Gif. 552.

(g) *Wilcocks v. Wilcocks*, 2 Ver. 558 ; *Deacon v. Smith*, 3 Atk. 323 ; consider *Wellesley v. Wellesley*, 4 My. & Cra. 561. be settled to the same uses as to the settled estates, does not authorize an expenditure on substantial improvements. *Dunne v. Dunne*, 7 De G., M. & G. 207 ; *Dent v.*

(h) *Garthshore v. Chalie*, 10 Ves. 9; Dent, *supra*.
Ex parte Poole, 11 Jur. 1005. (l) *Sowden v. Sowden*, 1 Bro. C. C.

(i) *Sowden v. Sowden*, Cox's n. 3 P. 582; *Trench v. Harrison*, 17 Sim. 111, Wms. 228; *Lechmere v. Ld. Carlisle*, 3 P. husband acting with trustee's consent.
Wms. 211; For. 80; App. Purch. No. 22; (m) *Lechmere v. Ld. Carlisle*, *ubi sup.*
Whorwood v. Whorwood, 1 Ves. 540; (n) S. C.; 3 Atk. 329.
Sowden v. Sowden, 3 P. Wms. 228, n.; (o) *Deacon v. Smith*, 3 Atk. 323.

lands, unless he showed an intention to elect.(p) And the rule applies equally where a man is under an obligation to lay out money in land, for example, by an act of parliament,(q) although not bound by covenant. And where the covenant by the intended husband in a settlement before marriage was to purchase lands and secure the wife's jointure on them, and he charged all the estates he might become entitled to with the jointure, the wife's jointure was sustained as a charge on an estate afterwards purchased by the husband in preference to an equitable mortgage by deposit of the title deeds.(r)

6. In a case where a man covenanted by his settlement to convey a real estate of which he was seised, and afterwards exchanged it for another estate and a sum of money, it was held that the estate taken in exchange and the money should go in substitution of the estate covenanted to be settled, and that the money was a specialty debt.(s)

7. Where a clear intent appears to *lay out* the entire sum in the *future* purchase of lands, estates of which the covenantor was seised at the time of the covenant, and which he permitted to descend, cannot go in performance of the agreement.(t)

8. And to inure as a performance, the property purchased must be such as will answer the intent of the settlement.(u) Therefore, under a covenant to purchase fee simple lands in possession, estates in reversion expectant upon lives will not go in performance,(x) * unless, perhaps, they fall into possession in the covenantor's lifetime; neither will leaseholds for lives, nor terms of years, even with covenants to purchase the fee, go in performance, as they cannot descend to the heir.(y)

9. So a moiety of a house would not be considered a kind of property within a covenant to purchase lands of inheritance: nor would lands, having a different descent, as borough-English lands, which descend to the youngest son, instead of lands descendible

(p) S. C.

(q) *Tubbs v. Broadwood*, 2 Rus. & My. 487.

(r) *Creed v. Carey*, 7 Ir. Ch. 295.

(s) *Powdrell v. Jones*, 2 Sm. & Gif. 335; no question was raised as to the exchange itself.

(t) *Lechmere v. Ld. Carlisle*, For. 80;

Davys v. Howard, 5 Bro. P. C. 552.

(u) *Lewes v. Hill*, 1 Ves. 274.

(x) *Lechmere v. Ld. Carlisle*, 3 P. Wms. 211; *Deacon v. Smith*, 3 Atk. 323; *Whorwood v. Whorwood*, 1 Ves. 540.

(y) *Lechmere v. Ld. Carlisle*, *ubi sup.*

to the eldest son, according to the course of the common law.(z) Neither will copyhold estates go in part performance of a covenant to purchase freehold lands, where the nature of the tenure would prevent compliance with the terms of the settlement, as where the estate is to be settled on one for life *without impeachment of waste*.(a) But where this circumstance does not occur, copyhold estates may, it should seem, go in part performance of a covenant to purchase real estates,(b) although Lord Hardwicke seems to have doubted whether copyhold lands could go in performance, as they are liable to different tenures and to forfeiture.(c)

10. But although the money be improperly invested, yet it may be followed in the land purchased with it. Thus where the money ought to have been laid out in the purchase of land of inheritance, and the tenant for life laid it out in his own name in the purchase of a valuable leasehold estate, and mortgaged it to the trustees, and demised a portion of it to the attorney employed, at a small rent, and the trustees confirmed the lease, the estate purchased was held to be bound by the settlement discharged of the lease.(d) So if the husband with the assent of the trustees invest the trust money in a property not authorized by the settlement, yet *as between him and the trustees*, he will be held to have purchased the estate for them.(e)

11. Where the purchase was made *bonâ fide* with an intent to perform the covenant, the lands must, it is conceived, in most cases be taken at the price paid for them,(f) or at least at their value at that time. This construction, however, is not made to the prejudice of purchasers, for if the covenantor sell the estates, it will be evidence of his intention that they should not be bound by the settlement.(g) But it is no objection in these cases that the arrangement will affect specialty creditors.(h) If the cove-

(z) Pennill v. Hallett, Amb. 106; see 3 & 4 W. 4, c. 106, *sup*.

(a) S. C.

(b) Wilks v. Wilks, 5 Vin. Ab. 293; the covenant was generally to purchase lands.

(c) Whorwood v. Whorwood, 1 Ves. 540; Trench v. Harrison, 17 Sim. 111, right of *cestui que trust*.

(d) Phayre v. Perce, 3 Dow, 116; Sugd. H. of L. 160.

(e) Trench v. Harrison, 17 Sim. 111.

(f) Lechmere v. Ld. Carlisle, For. 80; consider Pennill v. Hallett, Amb. 106; Napier v. Staples, 10 Ir. Ch. Rep. 358.

(g) Smith v. Deacon, 3 Atk. 323.

(h) S. C.

nantor only mortgage the purchased * estate, the equity of redemption may still go to the uses of the settlement.(i)

12. Where under a power, upon an investment in land of trust moneys, the husband advanced a further sum, and the estate was conveyed to the trustees, without noticing the sum advanced by the husband, this was held an advancement, and in such a case it requires very strong evidence to show that he did not intend it for the benefit of all parties under the settlement; (k) nor can the husband claim for improvements on the estate.(l)

13. It is a general rule, although it may not hold universally true, that a covenant to convey and settle lands will not be a specific lien on the lands of the covenantor, but the covenantee will be a creditor by specialty.(m)

14. A man may of course covenant to settle an estate if the person with whom he has contracted for it can make a good title to it, limiting his responsibility to that contract, and reserving to himself, if a title cannot be made, the right to buy the estate from any other person for his own benefit; and a purchase under that reservation will not give any right, either at law or in equity, to the persons claiming under the settlement.(n) In favor of the intention, a covenant by a husband to charge a jointure out of "estates he should *thereafter* acquire," may extend to estates over which by contract he had already obtained the equitable ownership.(o)

15. It may here be observed generally, that where an executor or trustee obtains a further interest by purchase, it will inure to the benefit of the persons entitled to the original interest.(p)

(i) *Ex parte Poole*, 11 Jur. 1005.

(k) *Ouseley v. Anstruther*, 10 Beav. 461; the estate had been resold, and the money received by the husband.

(l) *Horlock v. Smith*, 22 L. T. 232; see *Robinson v. Sykes*, 2 Jur. N. S. 895.

(m) *Lady Mornington v. Keane*, 2 De G. & J. 292.

(n) *Doe v. Rowe*, 4 Bing. N. C. 737.

(o) *Warde v. Warde*, 16 Beav. 103.

(p) *James v. Dean*, 11 Ves. 383, 15 Ves. 236; *Fosbrooke v. Balguy*, 1 My. & Ke. 226; marg. n. incorrect, see pl. 3, *sup.*; see a singular case, *Vaughton v. Noble*, 30 Beav. 34.

* CHAPTER XXII.

OF THE PROTECTION AND RELIEF AFFORDED TO PURCHASERS BY STATUTES.

SECTION I.

OF FRAUDULENT AND VOLUNTARY SETTLEMENTS, AND SETTLEMENTS WITH POWERS OF REVOCATION.

1. 27 Eliz. c. 4: fraudulent conveyances void against purchaser. — So conveyance with power of revocation in grantor.
2. Act extends to copyholds: mortgagee a purchaser. — King. — Adequacy of purchaser's consideration. — Purchaser must buy an existing interest.
3. Fraudulent conveyances void though not made by the vendor.
4. Purchaser under second voluntary grantee preferred to first voluntary grantee.
5. Binds the crown.
6. Voluntary settlements are void against purchaser.
7. Deposit of deeds.
8. Conveyance to wife or children voluntary.
9. Purchase in name of wife or child.
10. Settlement prior to marriage not voluntary.
11. Marriage consideration runs through the settlement. — How far marriage consideration extends to collaterals. — Remainders to collaterals not supported though settlor tenant in tail. — Resettlement by two, on the survivor. — Settlement of woman's estate.
12. Settlement supported by additional portion, &c. — Or by wife's concurrence in destroying another settlement.
13. Separation with deed of indemnity. — Settlement of personal estate binding.
14. Purchase for and conveyance by seller to charity.
15. Stranger not aided in equity.
16. Voluntary settlement good by matter *ex post facto*.
17. Applied to equitable rights. — Marriage upon the faith of voluntary settlement.
18. Settlement for valuable consideration apparently voluntary.
19. Contract to sell by voluntary settlor enforced for purchaser. — Vendor cannot enforce the agreement.
20. Suit to enforce voluntary settlement: sale by settlor.
21. Powers of revocation: partial power. — Power with colorable conditions. — Binding powers. — Settlement with power void, although made for valuable consideration.
22. Future power, and sale before the day. — Extinguishment of power inoperative.

1. By 27 Eliz. c. 4, (a) all conveyances, &c., of any hereditaments, *for the intent and of purpose to defraud and deceive* (b) purchasers are made void as against them. (1) And so are conveyances of any hereditaments * with any clause of revocation at pleasure which the grantor shall afterwards sell, the first conveyance not being revoked according to the power reserved by the *secret* conveyance.

(a) Perpetual by 39 Eliz. 18, s. 3. [Chancellor Kent, referring to this statute observes, that it "being made before the settlement of this country, and being in affirmation of the rules and principles of the common law, may be considered as part of the common law which accompanied the emigration of our ancestors." 4 Kent (11th ed.), 462, 463; *Beal v. Warren*, 2 Gray, 451; *Bean v. Smith*, 2 Mason, 276; *Gardner v. Cole*, 21 Iowa, 205; *Cathcart v. Robinson*, 5 Peters (U. S.), 280; *Dyer v. Homer*, 22 Pick. 258; 1 Story Eq. Jur. §§ 352, 353; *Hamilton v. Russell*, 1 Cranch, 309. The object of the statute was to give full protection to subsequent purchasers from the grantor against mere volunteers under prior conveyances. 1 Story Eq. Jur. § 425. The statute of 13 Eliz. c. 5, against fraudulent conveyances to defeat and delay creditors, though enacted for a purpose entirely distinct from that of 27 Eliz. c. 4 (*Stevens v. Morse*, 47 N. H. 534-536), is nevertheless very intimately connected with it in many of the rules and principles of its construction. For a full discussion of the law as affected by this act of 13 Eliz., and an extensive citation of the cases relating to it, see *Reade v. Livingston*, 3 John. Ch. 481; 2 Kent (11th ed.), 440 *et seq.*; 1 Story Eq. Jur. § 352 *et seq.*; *Skarf v. Soulbey*, 1 Mac. & G. 364, note (2); *Lusk v. Wilkinson*, 5 Ves. (Sumner's ed.) 388 in notes; Mr. Wallace's notes to *Sexton v. Wheaton* and *Salmon v. Bennett*, in 1 Amer. Lead. Cas. 36 *et seq.*; *ante*, 706, note.]

(b) See *Perry Herrick v. Attwood*, 2 De G. & J. 21. [In this case of *Perry Herrick v. Attwood*, 2 De G. & J. 39, 40, Lord Cranworth observes that "though we are most familiar with the application of the act to voluntary conveyances, it is not necessary that a conveyance should be voluntary to come within it. There is not a word in the statute about a conveyance being voluntary; the statute speaks only of conveyances made for the purpose of deceiving persons who shall purchase the property, and of conveyances by the secret intent of the conveying parties to be to their own proper use." A similar suggestion is made by Thomas J. in *Beal v. Warren*, 2 Gray, 452, 453, where he remarks that "it is to be observed that the statute of 27 Eliz. c. 4, has said nothing in reference to voluntary conveyances. It seeks to frustrate and render void conveyances, not because they are voluntary, but because made with the intent and purpose to deceive and defraud such persons as shall purchase the land for money or other good consideration. They are void not because they are voluntary, but because they are fraudulent." Courts of equity had jurisdiction in the matter long before the statute. The act has not defeated the jurisdiction, but gives only a more clear and distinct jurisdiction, and a more extended remedy. Lord Cranworth in *Perry Herrick v. Attwood*, 2 De G. & J. 43; *Kerr F. & M.* (1st Am. ed.) 227; 1 Story Eq. Jur. § 353, note.]

(1) 12 & 13 Vict. c. 95, s. 6; 13 & 14 Vict. c. 29, s. 8, making void voluntary conveyances against judgment creditors in Ireland; General Act, 10 Car. 1, s. 2, c. 3. See *Evans v. Evans*, 2 Ir. C. R. 242; *Hyde v. Atkinson*, *Id.* 246.

2. The act extends as well to copyholds as to freeholds,(c) and a mortgagee is, of course, a purchaser *pro tanto*.(d) And it extends also to fraudulent conveyances to the king;(e) and notice to a purchaser is of no consequence.(f) But to take advantage of this statute, a person must have purchased *bonâ fide* and for a valuable consideration,(g) which must not be so small as to be palpably fraudulent.(h) The settlor cannot by his admission of receipt of money cut down the previous settlement made by himself; his subsequent declarations will not affect the settlement.(i) And the subject of the sale must be an existing lawful interest.(k) In a late case,(l) after a voluntary settlement, a general mortgage for creditors of all his real and personal estate was held to defeat the settlement under this statute, for the property as between himself and a subsequent purchaser was still his.

(c) *Doe v. Bottrill*, 5 B. & Ad. 131; 32 Ill. 155; *Hildreth v. Sands*, 2 John. Ch. 35, 49, 50; *Townend v. Toker*, L. R. 1

(d) *Doe v. Webber*, 1 Ad. & El. 733; Ch. Ab. 458.]

[*Lancaster v. Dolan*, 1 Rawle, 231, 244; *Presbyterian Corporation v. Wallace*, 3 Rawle, 130; *Lewis v. Love*, 2 B. Mon. 345, 347; *Clapp v. Leatherbee*, 18 Pick. 131, 138; *Wyman v. Brown*, 50 Maine, 148; *Freeman v. Lewis*, 5 Ired. 91; *Ledyard v. Butler*, 9 Paige, 132; *Potts v. Blackwell*, 3 Jones Eq. 449; *S. C. 4 Jones Eq. 58*. Whether one who receives a mortgage in payment of, or security for, a preëxisting debt, is a purchaser entitled to protection, see *Glidden v. Hunt*, 24 Pick. 221; *Clark v. Flint*, 22 Pick. 231, 243; *Root v. French*, 13 Wend. 570; *Dickerson v. Tillinghast*, 4 Paige, 215, 221; *Padgett v. Lawrence*, 10 Paige, 171, 180; *Morse v. Godfrey*, 3 Story, 365, 389, 390; 2 Cruise Dig. by Mr. Greenleaf, vol. 4, tit. 32, ch. 28, § 39, in note; *Bay v. Coddington*, 5 John. Ch. 54; 20 John. 637; *James v. Johnson*, 6 John. Ch. 417.]

(e) *Magdalen Coll. case*, 11 Rep. 66; *Wiseman's case*; *Chomley's case*, 2 Rep. 15, 50; 2 Ro. Ab. 393; 3 & 4 W. 4, c. 74.

(f) *Gooch's case*, 5 Rep. 60; [*Post*, 714, note.]

(g) *Humphreys v. Pensam*, 1 My. & Cra. 580. [See *Moshier v. Knox College*,

(h) *Upton v. Bassett*, Cro. Eliz. 444; *Needham v. Beaumont*, 3 Rep. 83, b; 2 And. 233; *Doe v. Routledge*, Cow. 705; *Bullock v. Sadlier*, Amb. 764; *Hill v. B. of Exeter*, 2 Taunt. 69; *Doe v. James*, 16 East, 212; *Doe v. Rowe*, 4 Bing. N. C. 737; 1 Ves. & Bea. 184; Sugd. Pow. [In the case of deeds alleged to be voluntary, the court does not inquire into the quantum of consideration; the question to be considered is whether there was consideration; whether the transaction was one of bargain or of gift merely. *Townend v. Toker*, L. R. 1 Ch. Ab. 458; see *Kerr F. & M.* (1st Am. ed.) 228, 229; *Roberts v. Williams*, 4 Hare, 113; *Kelson v. Kelson*, 10 Hare, 385; *Fullenwider v. Roberts*, 4 Dev. & Bat. Eq. 278; *Tate v. Tate*, 1 Dev. & Bat. Eq. 22; *Taylor v. Heriot*, 4 Desaus. 227; *Banks v. Brown*, *Riley Ch.* 131; *Duffy v. Ins. Co.* 8 Watts & S. 413; *Harrison v. Carroll*, 11 Leigh, 476.]

(i) *Doe v. Webber*, 3 Nev. & Man. 586; 1 Ad. & El. 733.

(k) *Co. Litt.* 3 b; *Hatton v. Jones*, Bul. N. P. 90.

(l) *Barton v. Vanheythuysen*, 11 Hare, 126.

This may require further consideration; the property is well vested in the parties under the settlement, and does not remain the property of the settlor,^(l) although if he sell the very property to a purchaser, the latter will prevail over the settlement by force of the statute.

3. Although the fraudulent conveyance is not made by the vendor himself, yet it is void against a purchaser. Therefore, if a father make a fraudulent lease, and then die, and the person claiming under him sell the estate, the purchaser shall avoid the lease, whether the vendor did or did not know of its existence.^(m)

(^l) [A voluntary or fraudulent conveyance is good between the parties and their representatives, and binds all persons except creditors and subsequent purchasers, precisely as if there were no taint of fraud in it. *Morton J. in Dyer v. Homer*, 22 Pick. 258; *Reichart v. Castator*, 5 Binn. 109; *Sherk v. Endress*, 3 Watts & S. 255; *Jackson v. Garnsey*, 16 John. 188; *Worth v. Northam*, 4 Ired. (Law) 102; *Gillespie v. Gillespie*, 2 Bibb, 89, 91; *Dale v. Harrison*, 4 Bibb, 65; *Findley v. Cooley*, 1 Blackf. 263; *Randall v. Phillips*, 3 Mason, 378, 388; *Byrd v. Curlin*, 1 Humph. 466; *Lassiter v. Cole*, 8 Humph. 621; *Dearman v. Radcliffe*, 5 Ala. 192; *McGuire v. Miller*, 15 Ala. 394; *Clapp v. Tirrell*, 20 Pick. 250; *Drinkwater v. Drinkwater*, 4 Mass. 354; *Chapin v. Pease*, 10 Conn. 69; *Jackson v. Cadwell*, 1 Cowen, 622; *Sumner v. Murphey*, 2 Hill (S. C.), 488; *Neely v. Wood*, 10 Yerger, 486; *Dunlap v. Dunlap*, 10 Ohio, 162; *Benton v. Jones*, 8 Conn. 186; 1 Story Eq. Jur. § 425; *Harvey v. Varney*, 98 Mass. 118; *Horner v. Zimmerman*, 45 Ill. 14; *Stevens v. Harrow*, 26 Iowa, 458; *Lawton v. Gordon*, 34 Cal. 36; *White v. Brocaw*, 14 Ohio (N. S.), 339; *Robinson v. Stewart*, 10 N. Y. 189; *Stanton v. Green*, 34 Miss. 576; *Fargo v. Ladd*, 6 Wis. 106; *Hill v. Pine River Bank*, 45 Maine, 300; *Lokerson v. Stillwell*, 2 Beasley (N. J.), 357; *Moore v. Meek*, 20 Ind. 484. Equity will not compel a reconveyance or enforce a secret trust in favor of the grantor or his heirs. *Stewart v. Iglehart*, 7 Gill & J. 132, 136;

James v. Bird, 8 Leigh, 510; *Owen v. Sharp*, 12 Leigh, 427; *Grider v. Graham*, 4 Bibb, 70; *Jackson v. Dutton*, 3 Harr. 98; *Hershey v. Weiting*, 50 Penn. St. 240; *ante*, 702, note; *Bryant v. Mansfield*, 22 Maine, 310; *Randall v. Phillips*, 3 Mason, 378; *Mason v. Baker*, 1 A. K. Marsh. 208; *McClure v. Purcel*, 3 A. K. Marsh. 61; *Stewart v. Dailey*, 6 Litt. 212. Nor will equity enforce the execution of a contract in favor of the grantee, where the parties are in *pari delicto*; *Mason v. Baker*, 1 Marsh. 208, 210; *Norris v. Norris*, 9 Dana, 317; nor against the grantee, *Fargo v. Ladd*, 6 Wis. 106. A reconveyance by a fraudulent grantee in failing circumstances to his grantor without consideration, is fraudulent and void as to the creditors of the fraudulent grantee. *Chapin v. Pease*, 10 Conn. 69; *Davis v. Graves*, 29 Barb. 480. The conflict of interests that might arise between the creditors of the fraudulent grantor and those of the fraudulent grantee, was suggested in *Chapin v. Pease*, but no decision upon the point was called for. But equity, when ordering the estate fraudulently conveyed to be sold for the payment of the fraudulent grantor's debts, will direct any surplus to be restored to the fraudulent grantee. *Burtch v. Elliot*, 3 Ind. 100; *Rochelle v. Harrison*, 8 Porter, 352.]

(^m) *Burrell's case*, 6 Rep. 72; *Jones v. Groobham*, Co. Litt. 3 b; *Warburton v. Loveland*, 1 Dow & Cla. 497; *Blake v. Hyland*, 2 Dru. & Wal. 397; *Clerk v. Rutland*, Lane, 113; *Wynn v. Williams*, 5

But the rule has never been carried to this extent, that a father's *bonâ fide* conveyance of the fee or of any partial interest, although voluntary, can be set aside by a sale by the devisee or heir at law of the father. The rule properly confined to transactions really fraudulent, or fraudulently kept on foot, seems to be open to no solid objection, and it is not likely to be carried further.⁽ⁿ⁾ And this point has now been *decided, so that an heir or devisee of a person who has made a voluntary conveyance cannot by a sale avoid such conveyance, and the decision in *Burrell's* case has been referred to the true ground.^(o)

4. Where a man made two voluntary conveyances to different persons, and the grantee under the last of those conveyances sold for value, it was held that the purchaser should avoid the first of the voluntary conveyances.^(p) But this has been overruled, for after the first voluntary conveyance, the grantor had no estate in him which he could convey to any one *but* a purchaser for value; the second conveyance, therefore, passed nothing, and a purchaser from the grantee under it could not prevail over the first voluntary grantee. This places the law on a proper footing.^(q)

5. The statute being general, and to suppress fraud, extends to fraudulent conveyances to the king,^(r) although by his prerogative at common law the estate in the crown could not be affected.^(s)

6. A voluntary settlement, although made *bonâ fide*, and the purchaser have direct notice of it, is made void by the act as against the purchaser.^(t) This was ruled by *Taylor v. Stile*.^(u)

Ves. 130; but *qu.* this case; [*Clapp v. Leatherbee*, 18 Pick. 131, 138.]

⁽ⁿ⁾ *Parker v. Carter*, 4 Hare, 409, 410; *Doe v. Lewis*, 11 C. B. 1035. [See *Clapp v. Leatherbee*, 18 Pick. 131.]

^(o) *Doe v. Rusham*, 17 Q. B. 723; *Lewis v. Rees*, 3 K. & J. 132; *Kinderley v. Jervis*, 22 Beav. 1; [*Clayton v. Brown*, 27 Geo. 96; *Bell v. McCawley*, 29 Geo. 325; 1 Story Eq. Jur. § 434 a; *Russell v. Kearney*, 27 Geo. 96. This rule follows from the principle upon which a sale by the settlor himself avoids such a conveyance; which is, that a subsequent sale shows the existence of an originally fraudulent intention. 2 Dart V. & P. (4th

Eng. ed.) §25. Such intention would not be shown in a sale by an heir or devisee of the person who made the voluntary conveyance. The acts of one man could not show the mind and intention of another. 1 Story Eq. Jur. § 434 a.]

^(p) *Jones (Lessee Moffatt) v. Whittaker*, 1 Lon. & Tow. 141; 3 K. & J. 141, 142.

^(q) *Doe v. Rusham*, 17 Q. B. 723; [1 Story Eq. Jur. § 433.]

^(r) *Magdalen Col. case*, 11 Rep. 66.

^(s) *Wiseman's case*; *Chomley's case*, 2 Rep. 15, 50; 2 Ro. Ab. 393.

^(t) *Evelyn v. Templar*, 2 Bro. C. C.

^(u) *Chy.* 1763, MS.

A. settled lands, after his marriage, on his wife for life, and then sold the lands to B., who had notice of the wife's estate for life,

148; *Doe v. Martyr*, 1 New R. 332; *Doe v. Hopkins*, 9 East, 70; *Doe v. Manning*, 9 East, 59; *Hill v. Bp. of Exeter*, 2 Taunt. 69; 18 Ves. 141; *Gully v. Bp. of Exeter*, 10 B. & C. 601. [In *Beal v. Warren*, 2 Gray, 453, Thomas J. said: "The effect of the construction given to the statute under the English rule is this; If a man makes a voluntary conveyance from love, affection, or sense of moral duty, and afterwards conveys the same estate to a third person for a valuable consideration, the mere making of the second deed shall be conclusive evidence of a fraudulent intent in making the first, no matter what the interval of time by which they are separated." See *Kerr F. & M.* (1st Am. ed.), 227; *Daking v. Whimper*, 26 Beav. 568; *Kelson v. Kelson*, 10 Hare, 385; *Clarke v. Wright*, 6 H. & N. 849; 1 Am. Lead. Cas. (4th ed.) 46, 47; *Clapp v. Leatherbee*, 18 Pick. 136, 137; *Ricker v. Ham*, 14 Mass. 137; *Clapp v. Tirrell*, 20 Pick. 247; *Caines v. Jones*, 5 Yerger, 450; *Marshall v. Booker*, 1 Yerger, 13, 15; *Mason v. Baker*, 1 Marsh. 208; *Doyle v. Sleeper*, 1 Dana, 531; *Freeman v. Eatman*, 3 Ired. Eq. 81; *Serry v. Arden*, 1 John. Ch. 260; S. C. 12 John. 536; *Elliott v. Horn*, 10 Ala. 348; *Carter v. Castleberry*, 5 Ala. 377; *Barrineau v. McMurray*, 3 Brev. 204; *Clanton v. Burges*, 2 Dev. Eq. 13; *Tate v. Liggat*, 2 Leigh, 84; *Lewis v. Love*, 2 B. Mon. 345, 347; 1 Story Eq. Jur. § 426; *Cain v. Busby*, 30 Geo. 714. "This doctrine, however," Mr. Justice Story remarks, "is admitted to be full of difficulties; and it has been confirmed, rather upon the pressure of authorities, and the vast extent to which titles have been acquired and held under it, than upon any notion that it has a firm foundation in reason and a just construction of the statute. The rule, *stare decisis*, has here been applied to give repose and security to titles fairly acquired, upon the faith of judicial decisions." 1 Story Eq. Jur. §

426; 1 Fonbl. Eq. bk. 1, ch. 1, § 13, note (g). But this construction of the statute has been rejected in Massachusetts and in many other States. In the above case of *Beal v. Warren*, 2 Gray, 456, Thomas J. said: "The true construction of the statute we think is, that conveyances are not avoided merely because they are voluntary, but because they are fraudulent; that a voluntary gift of real estate is valid as against subsequent purchasers and all other persons unless it was fraudulent at the time of its execution; that a subsequent conveyance for a valuable consideration is evidence, but by no means conclusive evidence, of fraud in the first voluntary conveyance; and that a voluntary gift, made when the grantor is not indebted, in good faith, and without intent to defraud future creditors or subsequent purchasers, is good as against a subsequent purchaser for valuable consideration with notice. Such we understand to be the construction practically adopted in this commonwealth, and which is, to use the words of Chancellor Kent, 'the better American doctrine.'" 4 Kent (11th ed.), 464, note (a); *Bennett v. Bedford Bank*, 11 Mass. 421; *Ricker v. Ham*, 14 Mass. 137; *Salmon v. Bennett*, 1 Conn. 525; *Cathcart v. Robinson*, 5 Peters (U. S.), 280; *Jackson v. Town*, 4 Cowen, 603; 1 Story Eq. Jur. § 427 *et seq.*; 1 Cruise Dig. by Mr. Greenleaf, tit. 7, c. 2, § 7, note; 1 Am. Lead. Cas. (4th ed.) 47. The above apparently most reasonable, is generally the prevailing construction of the statute in the United States. *Bank of Alexandria v. Patton*, 1 Rob. 499; *Anderson v. Green*, 7 J. J. Marsh. 448; *Foster v. Walton*, 5 Watts, 378; *Dougherty v. Jack*, 5 Watts, 456; *Speise v. McCoy*, 6 Watts & S. 485; *Baltimore v. Williams*, 6 Md. 242; *Cook v. Kell*, 13 Md. 469; *Atkinson v. Phillips*, 1 Md. Ch. 507; *Shaw v. Levy*, 17 Serg. & R. 99; *Lancaster v. Dolan*, 1 Rawle, 231; *Hudnal v. Wilder*,

and took counsel's opinion on the point. A. died, and his wife brought her bill to be let into her life estate. Lord Northington

4 McCord, 295, 310; *Moultrie v. Jennings*, 2 McMullan, 508; *Howard v. Williams*, 1 Bailey, 575; *Footman v. Pendergrass*, 3 Rich. Eq. 33; *Gardner v. Booth*, 31 Ala. 136; *Frisbie v. McCarty*, 1 Stew. & P. 68; *Corprew v. Arthur*, 15 Ala. 525; *Farmers' Bank v. Douglass*, 12 Sm. & M. 472, 548; *Tate v. Liggat*, 2 Leigh, 84; *Hiatt v. Wade*, 8 Ired. 340; *Chaffin v. Kimball*, 23 Ill. 36; *Coppage v. Barnett*, 34 Miss. 621; *Brackett v. Waite*, 4 Vt. 389; S. C. 6 Vt. 411; *Holley v. Adams*, 16 Vt. 209; *Duhine v. Young*, 3 Bush (Ky.), 343; *Enders v. Williams*, 1 Met. (Ky.) 347; 1 Story Eq. Jur. § 427 *et seq.*; *Seward v. Jackson*, 8 Cowen, 406; *Wickes v. Clarke*, 8 Paige, 165; *Stevens v. Morse*, 47 N. H. 532; *Brown v. Bucks*, 22 Geo. 574; *Clayton v. Brown*, 17 Geo. 217; *Gardner v. Cole*, 21 Iowa, 205; *Robinson v. Martel*, 11 Texas, 149; *Fowler v. Stoneum*, 11 Texas, 478; *Vansant v. Davies*, 6 Ohio, N. S. 52; *Moseley v. Moseley*, 15 N. Y. 334; *Sanger v. Eastwood*, 19 Wend. 516; *Aiken v. Bruen*, 21 Ind. 137. But a conveyance actually fraudulent is void against a subsequent purchaser for a valuable consideration, although he has notice of it. *Ricker v. Ham*, 14 Mass. 137; *Clapp v. Leatherbee*, 18 Pick. 131, 137, 138; *Clapp v. Tirrell*, 20 Pick. 247; *Lewis v. Love*, 2 B. Mon. 345, 347; *Mason v. Baker*, 1 Marsh. 208; *Verplank v. Sterry*, 12 John. 536, 556, 557; *Hudnal v. Wilder*, 4 McCord, 295; *Sanger v. Eastwood*, 19 Wend. 514; *Foster v. Walton*, 5 Watts, 378; *Douglas v. Dunlap*, 10 Ohio, 162; *Bank of Alexandria v. Patton*, 1 Rob. 500, 539. In some of these cases it has been held that the fraud must be intended specifically against purchasers, and that they cannot avoid a conveyance intended to defraud creditors only. And upon this ground it was decided in *Stevens v. Morse*, 47 N. H. 532, that a conveyance without consideration made to defraud the creditors of the grantor, is valid against a subsequent purchaser for a valuable and sufficient consideration, with notice of the first conveyance. See, to the same effect, *Foster v. Walton*, 5 Watts, 378; *Shaw v. Levy*, 17 Serg. & R. 99; *Robinson v. Martel*, 11 Texas, 149; *Fowler v. Stoneum*, 11 Texas, 478; *Douglas v. Dunlap*, 10 Ohio, 162; *Vansant v. Davies*, 6 Ohio N. S. 52; *Burgett v. Burgett*, 1 Ham. 469; *Moseley v. Moseley*, 15 N. Y. 334; *Sanger v. Eastwood*, 19 Wend. 514; *Teasdale v. Atkinson*, 2 Brev. 48; *Doolittle v. Lyman*, 44 N. H. 608, 613; *Woodman v. Bodfish*, 25 Maine, 317; *Schettler v. Brunettes*, 7 Wis. 197; *Coppage v. Barnett*, 34 Miss. 621; *Lawton v. Gordon*, 34 Cal. 36. The authorities on the subject are conflicting. In Massachusetts the opposite doctrine has been maintained. *Ricker v. Ham*, 14 Mass. 137; *Clapp v. Leatherbee*, 18 Pick. 131; *Beal v. Warren*, 2 Gray, 148; see, also, *Wadsworth v. Havens*, 3 Wend. 411; *Hudnal v. Wilder*, 4 McCord, 295, 303; *Clapp v. Tirrell*, 20 Mass. 247; *Wyman v. Brown*, 50 Maine, 148; *Kimball v. Hutchins*, 3 Conn. 450; *Carter v. Castleberry*, 5 Ala. 377; *Walter v. Crake*, 8 B. Mon. 11; *How v. Waysman*, 12 Missou. 169. It is said in 1 Am. Lead. Cas. (4th ed.) 49, that "there can be no reasonable doubt that a conveyance which is fraudulent against creditors upon the ground of its being fictitious, or without consideration, and otherwise presumably for the benefit of the grantor, is fraudulent against subsequent purchasers; but an absolute conveyance on full consideration, which is fraudulent against creditors only because actually intended to hinder and delay them, would not be void against purchasers." See *Wyman v. Brown*, 50 Maine, 148; *Coppage v. Barnett*, 34 Miss. 621. In order, then, to meet all the circumstances under which a *bonâ fide* purchaser for value may avoid a voluntary settlement or conveyance, it is important to consider the cases in which such a set-

held the law to be clear, that a subsequent purchaser for a valuable consideration, though with notice, should set aside a

tlement or conveyance is to be deemed fraudulent as to creditors. In *Smith v. Cherrill*, L. R. 4 Eq. 389, 395, Sir R. Malins V. C. said: "The doctrine of the court which is well established is this: if a person makes a voluntary settlement, and is, at the time, indebted to the extent of insolvency, or if the effect of the settlement is to deprive him of the means of paying, the settlement is void as against creditors." See *Norton v. Norton*, 5 Cush. 524; *Smith v. Yell*, 3 Eng. 470; *Thompson v. Webster*, 4 Drew. 628; *Potter v. McDowell*, 31 Missou. 62. In *Parkman v. Welch*, 19 Pick. 231, 235, Dewey J. said: "All that is necessary to entitle a creditor to impeach a deed as fraudulent when made without a valuable consideration, or on a secret trust, is that the grantor be deeply indebted." See *Hudnal v. Wilder*, 4 McCord, 294; *Howard v. Williams*, 1 Bailey, 575; *M'Elwee v. Sutton*, 2 Bailey, 128; *Wilson v. Howser*, 12 Penn. St. 109; *Wilson v. Buchanan*, 7 Gratt. 334; *Crumbaugh v. Kugler*, 2 Ohio, 373; *Neal v. Day*, 4 Jur. N. S. 1225; *Jenkyn v. Vaughan*, 3 Drew. 419; 2 Jur. N. S. 109; *Parker v. Proctor*, 9 Mass. 390; *Robinson v. Stewart*, 10 N. Y. 189; *Re Magawley's Trust*, 5 De G. & Sm. 1; *Holmes v. Penney*, 3 K. & J. 90; *Barlou v. Vanheythuyssen*, 11 Hare, 126; *French v. French*, 6 De G., M. & G. 95; *Clements v. Eccles*, 11 Irish Eq. 229. This subject was considered in the case of *Skarf v. Soulby*, 1 Mac. & G. 364; and it was there held that in the absence of any proof of actual insolvency, the mere fact that the settlor, at the time of executing a voluntary settlement, was owing some debts was not sufficient to invalidate it. See *Spirett v. Willows*, 12 W. R. 734, 735; S. C. 13 W. R. 329; S. C. 3 De G., J. & S. 293. In some cases it has been held that indebtedness, at the time of a voluntary settlement, is only presumptive evidence of fraud, and each case must depend upon its

circumstances, such as the amount of debts, &c. See *Lerow v. Wilmarth*, 9 Allen, 382; *Thacher v. Phinney*, 7 Allen, 146; *Brackett v. Waite*, 4 Vt. 389; *Porter v. Porter*, 4 Whart. 27; *Chambers v. Spencer*, 5 Watts, 404; *Bank of United States v. Housman*, 6 Paige, 526; *Lush v. Wilkinson*, 5 Ves. (Sumner's ed.) 384, 387, u. (b); *Tilley v. Register*, 4 Minn. 391; *Coolidge v. Melvin*, 42 N. H. 531; *Babcock v. Eckler*, 24 N. Y. 623; 2 Kent (11th ed.), 441 *et seq.* In *Lerow v. Wilmarth*, 9 Allen, 382, 386, Bigelow C. J. said: "The better doctrine seems to us to be that there is, as applicable to voluntary conveyances made on a meritorious consideration, as of blood and affection, no absolute presumption of fraud which entirely disregards the intent and purpose of the conveyance, if the grantor happened to be indebted at the time it was made; but that such a conveyance under such circumstances affords only *primâ facie* or presumptive evidence of fraud, which may be rebutted and controlled." The same doctrine was again asserted in *Winchester v. Charter*, 12 Allen, 608, 609, by the same learned judge, who added that, whether the conveyance is fraudulent or not "is a question of fact, to be determined on a view of all the circumstances attendant upon the making of a grant or conveyance, especially on the condition of the vendor or grantor as to property and as to the amount of debts which were due and owing from him at the time he undertook to dispose of his estate, or a portion thereof, by gift, or without adequate consideration. On the one hand, it could not be properly adjudged that a voluntary conveyance was fraudulent and void, either as against existing or subsequent creditors, if it was proved to have been made by a person substantially free from debt, and possessed of a large amount of property, who had no purpose to hinder or delay the creditors, and whose sole motive was to transfer the property for the

voluntary settlement; but it being suggested that there was no valuable consideration, an issue was directed to try that fact,

benefit of his wife or children, so that it should not remain at the hazard of business or be subjected to the risk of improvidence. On the other hand it would be very clear that a voluntary transfer of property by a person deeply indebted, and whose property was inadequate or barely sufficient for the payment of his debts, would furnish strong presumptive evidence of fraud; and, if unexplained, would be set aside as void against creditors. Nor would this presumption of fraud be confined in its effect to preëxisting creditors. It would be equally strong as to those whose debts were subsequently contracted; because a transfer of property under such circumstances affords a reasonable ground of presumption that the intent with which it was made was to put beyond the reach of creditors, future as well as present, the fund or capital to which they had a right to resort for the payment of their debts. Whenever, therefore, no actual fraud or express intent to hinder and delay creditors is proved, it is necessary to show that a grantor at the time of making a voluntary conveyance was indebted beyond his probable means of payment remaining after the conveyance, in order to lay the foundation for the inference that it was made with a fraudulent design." There is great weight of opinion and authority in favor of the doctrine above set forth. See 1 Story Eq. Jur. §§ 362-365; Sexton v. Wheaton, 8 Wheat. 229, 230; Hinde v. Longworth, 11 Wheat. 199; Salmon v. Bennett, 1 Conn. 525, 528-551; Verplank v. Sterrey, 12 John. 536, 559; Seward v. Jackson, 8 Cowen, 406, 423, 434, 438; Norton v. Norton, 5 Cush. 524; Thacher v. Phinny, 7 Allen, 146; Beal v. Warren, 2 Gray, 447; 1 Am. Lead. Cas. (4th ed.) 36-39; Enders v. Williams, 1 Met. (Ky.) 346; Church v. Chapin, 36 Vt. 223; Ellinger v. Cowl, 17 Md. 361; Pomeroy v. Bailey, 43 N. H. 118; Van Wyck v. Seward, 6 Paige, 62; Chambers v. Spencer, 5 Watts, 406; Holmes v. Penney, 5 W. R. 132; 3 Jur. N. S. 80, 3 K. & Jo. 90, 99; 2 Dart V. & P. (4th Eng. ed.) 827; Loeschigk v. Hatfield, 5 Rob. (N. Y.) 26; Story, Sales (4th ed.), § 513, & notes; Stewart v. Rogers, 25 Iowa, 395. But in Reade v. Livingston, 3 John. Ch. 481, where this subject was very fully discussed by Chancellor Kent, the doctrine maintained was, that a voluntary settlement by a person indebted at the time was fraudulent and void as to existing creditors. His language is: "The conclusion to be drawn from the cases is, that if the party is indebted at the time of the voluntary settlement, it is presumed to be fraudulent in respect to such debts (that is those antecedently due), and no circumstance will permit those debts to be affected by the settlement, or repel the legal presumption of fraud. The presumption of law in this case does not depend upon the amount of the debts, or the extent of the property in settlement, or the circumstances of the party. There is no such line of distinction set up or traced in any of the cases. The attempt would be embarrassing, if not dangerous, to the rights of creditors, and prove an inlet to fraud. The law has, therefore, wisely disabled the debtor from making any voluntary settlement of his estate to stand in the way of existing debts. This is the clear and uniform doctrine of the cases." And he concluded, "that fraud in a voluntary settlement was an inference of law, and ought to be so, so far as it concerned *existing* debts." Reade v. Livingston, 3 John. Ch. 501. See Den v. De Hart, 1 Halst. 450; Doughty v. King, 2 Stockt. (N. J.) 396; Jackson v. Seward, 5 Cowen, 67; Sexton v. Wheaton, 8 Wheat. 229; Hinde v. Longworth, 11 Wheat. 199; Bennett v. Bedford Bank, 11 Mass. 421; Miller v. Thompson, 3 Porter, 196; Foot v. Cobb, 18 Ala. 586; O'Daniel v. Crawford, 4 Dev. 197; Kissam v. Edmundson, 1 Ired. Eq.

which coming on before Bathurst J. at York, he suffered the counsel to enter into the equity; and after hearing the argument,

180; *Choteau v. Jones*, 11 Ill. 318; *Beers v. Botsford*, 13 Conn. 146; *Smith v. Smith*, 11 N. H. 460; *Gunn v. Butler*, 18 Pick. 248; *Emery v. Vinall*, 26 Maine, 295; *Sherwood v. Marwick*, 5 Greenl. 295; *Enders v. Williams*, 1 Met. (Ky.) 346; *Mitchell v. Berry*, 1 Met. (Ky.) 602; *Lowry v. Fisher*, 2 Bush (Ky.), 70. But it is said by Judge Story, that "this doctrine is certainly *strictissimi juris*, and assumes as a principle of law, that the mere indebtedment of a party constitutes, *per se*, conclusive evidence of fraud in a voluntary conveyance in all cases, where the creditors, to whom he is then indebted are concerned. Nay, it seems to go further; for, upon the same reasoning, subsequent creditors have been allowed to participate in the same relief, even though as to them alone, without such antecedent debts, there could be no relief." 1 Story Eq. Jur. § 360. And in *Freeman v. Pope*, L. R. 9 Eq. 206, Vice Chancellor James, declaring himself bound by the decision of Lord Westbury in *Spirett v. Willows*, 3 De G., J. & S. 293, and of Vice Chancellor Kindersley in *Jenkyn v. Vaughan*, 3 Drew. 419, but with obvious reluctance, held that, if at the time of executing a voluntary settlement the settlor is indebted, and in the result any prior creditor is delayed in payment of his debt, then, however solvent the settlor may have been at the time, and however free from any fraudulent intention the settlement may have been, it may be set aside at the suit of a subsequent creditor. Lord Westbury, in *Spirett v. Willows*, 3 De G., J. & S. 293, 302, stated it, as in his opinion a well founded conclusion, that if the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the

settlement." The decision of Vice Chancellor Kindersley in *Jenkyn v. Vaughan*, 3 Drew. 419, was, that if there be a creditor subsequent to the deed, and there be also at the time of filing the bill an unpaid creditor prior to the deed, the subsequent creditor has exactly the same right to file a bill as the prior creditor has. Where a conveyance is intentionally made to defraud creditors, it seems perfectly reasonable that it should be held void, as to all subsequent as well as to all prior creditors, on account of bad faith. 1 Story Eq. Jur. § 361; *Smyth v. Carlisle*, 16 N. H. 464; *Smyth v. Carlisle*, 17 N. H. 417; *Nicholas v. Ward*, 1 Head (Tenn.), 323; *Coolidge v. Melvin*, 42 N. H. 533, 534; *McConike v. Sawyer*, 12 N. H. 403; *Horn v. Volcano & Co.* 13 Cal. 62; *Clark v. French*, 23 Maine, 221; *Winchester v. Charter*, 12 Allen, 609, 610; *Savage v. Murphy*, 8 Bosw. (N. Y.) 75; *Mullen v. Wilson*, 44 Penn. St. 413; *Moore v. Blondham*, 19 Md. 172; *Livermore v. Boutelle*, 11 Gray, 217; *Marston v. Marston*, 54 Maine, 476; *Cramer v. Redford*, 2 C. E. Green (N. J.), 367; *Lowry v. Fisher*, 2 Bush (Ky.), 70; *Wyman v. Brown*, 50 Maine, 148. "But," Judge Story observes, "where the conveyance is *bonâ fide* made, and under circumstances demonstrative of the non-existence of any intention to defraud any creditor, there seems to be some difficulty in perceiving how the subsequent creditors can make out any right, as against the voluntary grantees, through the equity of the antecedent creditors." 1 Story Eq. Jur. § 361; see *Ward v. Hollins*, 14 Md. 158; *Bullett v. Taylor*, 34 Miss. 708; *Horn v. Volcano & Co.* 13 Cal. 62; *Nicholas v. Ward*, 1 Head (Tenn.), 323; *Enders v. Williams*, 1 Met. (Ky.), 346; *Todd v. Hartley*, 2 Met. (Ky.), 206; *Webb v. Roff*, 9 Ohio (N. S.), 430; *Whitescarver v. Bonney*, 9 Iowa, 480; *Fifield v. Gaston*, 12 Iowa, 218; *Hurdt v. Courtenay*, 4 Met. (Ky.), 139; *Lyman v. Cessford*, 15 Iowa,

said, he knew Lord Hardwicke had determined, in twenty instances, in the same manner as Lord Northington. The consideration was proved, and the case came on to be heard before the chancellor on the equity reserved, who thereupon dismissed the bill; and this has been frequently followed. Nor will a purchaser from the settlor be affected by a covenant by him in the settlement, that the purchase money should be paid to the trustees, to be laid out by them in other lands to be settled to the same uses; (x) nor can a *voluntary settlement be supported because it was made by direction of the court.(y)

7. But a deposit of the title deeds by a settlor *after* a voluntary settlement, will not prevail at law against the settlement; (y¹) trover may be maintained for the deeds; (z) nor will a prior voluntary conveyance be defeated by a subsequent settlement for value beyond the extent required to give effect to the limitations created for value in the later settlement.(a) The same

229; *Baker v. Gilman*, 52 Barb. 26; *Converse v. Hartley*, 31 Conn. 372; *Kendall v. Fitts*, 22 N. H. 6; *Parsons v. McKnight*, 8 N. H. 37; *Carlisle v. Rich*, 8 N. H. 50; *Smith v. Smith*, 11 N. H. 465; *Howe v. Ward*, 4 Greenl. 195. The reason given for avoiding a voluntary conveyance in favor of existing creditors does not apply to subsequent creditors with notice of the conveyance; that reason arises out of the presumption that credit was given on the apparent ownership of the property conveyed by the deed. *Converse v. Hartley*, 31 Conn. 372, 380. It should be observed that a good consideration is not sufficient to support a conveyance, if the intention be to defraud creditors; a conveyance made with such intention is void, though there may have been a full and valuable consideration paid therefor, and the grantor may have been entirely solvent. *Swinford v. Rogers*, 23 Cal. 233; *Harrison v. Kramer*, 3 Clarke (Iowa), 543; *Mills v. Howeth*, 19 Texas, 257; *Ruffing v. Tilton*, 12 Ind. 259; *Weisiger v. Chisholm*, 22 Texas, 670; 28 Texas, 780; *Gardinier v. Otis*, 13 Wis. 460; *Wadsworth v. Williams*, 100 Mass. 126; 2 Dart V. & P. (4th Eng. ed.), 827; *Bott v. Smith*,

21 Beav. 511; *Holmes v. Penney*, 5 W. R. 132; 8 Jur. N. S. 80; 3 K. & J. 90, 99; *Pulliam v. Newberry*, 41 Ala. 168; *Wyman v. Brown*, 50 Maine, 148; *Edgell v. Lowell*, 4 Vt. 405; *Trotter v. Watson*, 6 Humph. 509; 4 Kent (11th ed.), 464, note (f); *Alexander v. Todd*, 1 Bond Cir. & Dist. Ct. 175. Whether such a conveyance is void as to subsequent purchasers, see *Wyman v. Brown*, 50 Maine, 148.]

(x) *Evelyn v. Templar*, 2 Bro. C. C. 148; 18 Ves. 91, 93, 112.

(y) *Martin v. Martin*, 2 Rus. & My. 507. [2 Dart V. & P. (4th Eng. ed.) 813.]

(y¹) [See, as to the effect of depositing title deeds, in the United States, 1 Cruise Dig. by Mr. Greenleaf, vol. 2, tit. 15, ch. 1, § 20 in note; *Ib.* ch. 5, § 9, in note; 4 Kent (11th ed.), 150, 151; *Berry v. Mut. Fire Ins. Co.* 2 John. Ch. 603; *Johnson v. Stagg*, 2 John. 510, 512; *Maywood v. Lubhock*, 1 Bailey Eq. 382; *Vanmeter v. McFaddin*, 8 B. Mon. 435.]

(z) *Kerrison v. Dorrien*, 9 Bing. 76; *Moo. & Sco.* 114; *Daking v. Wimper*, 26 Beav. 568.

(a) Sugd. H. of L. 148. [See *Croker v. Martin*, 1 Bligh N. S. 573.]

principle would apply to a subsequent sale of a partial interest in the estate.

8. Any conveyance executed by a husband in favor of his wife or children, after marriage, which rests wholly on his moral duty to provide for them, is voluntary, and void against purchasers by force of the act.^(b) So a like settlement by a wife after marriage, whether under a power ^(c) or as owner of the fee with her husband,^(d) has been held to be voluntary; but this was not followed in a subsequent case in Ireland.^(e) Where the husband parts by the settlement with an interest in his marital right in the estate in favor of his wife, the settlement would be for valuable consideration.^(f)

9. But a *purchase* in the name of a wife or child is not within the act;^(g) and a settlement by a widow, previously to her second marriage, of her estate on the children of the first marriage, has not been deemed fraudulent;^(h) yet it has been decided that a contract for a purchase by a man cannot be protected by taking the conveyance to trustees to sell for the benefit of his wife and family. A mortgage of "all the man's real estate" was held to carry the estate so purchased against the voluntary settlement.⁽ⁱ⁾

10. A settlement made on a wife or children *prior* to marriage, is a conveyance for valuable consideration,^(k) but a settlement

(b) Woodie's case, Cro. Jac. 158; Chapman v. Emery, Cow. 278; Evelyn v. Templar, 2 Bro. C. C. 148; Doe v. Rowe, 4 Bing. N. C. 737; Parker v. Serjeant, Finch, 146. [See 1 Story Eq. Jur. § 355; Gassett v. Grout, 4 Met. 488; Picquet v. Swan, 4 Mason, 443. As to bankrupts, see 12 & 13 Vict. c. 106, s. 126.]

(c) Goodright v. Moses, 2 Black. 1019; Currie v. Nind, 1 My. & Cra. 17.

(d) Butterfield v. Heath, 15 Beav. 408; 1 Eq. R. 230; see Joyce v. Hutton, 11 Ir. Ch. Rep. 123; 12 Ir. Ch. Rep. 71, reversed.

(e) Green v. O'Kearney, 2 Ir. C. L. R. 267; see Parker v. Carter, 4 Hare, 409; and see Crofts v. Middleton, 2 K. & J. 194; reversed, 8 De G., M. & G. 192.

(f) Hewison v. Negus, 16 Beav. 594; and see Crofts v. Middleton, 2 K. & J. 194; reversed, 27 L. T. 114.

(g) *Supra*, [706; see State Bank of Indiana v. Harrow, 26 Iowa, 426.]

(h) Newstead v. Searles, 1 Atk. 265; Cowen, 280; Cotton v. King, 2 P. Wms. 674; and Dickenson v. Wright, 5 H. & N. 401; but see *infra*.

(i) Barton or Stone v. Van Heythusyen, 11 Hare, 126.

(k) Colville v. Parker, Cro. Jac. 158; Douglass v. Waad, 1 Ch. C. 99; Brown v. Jones, 1 Atk. 188; [Magniac v. Thompson, 7 Peters (U.S.), 349; Bradish v. Gibbs, 8 John. Ch. 523; Verplank v. Sterry, 12 John. 536; S. C. 1 John. Ch. 261; Whelan v. Whelan, 3 Cowen, 538, 579; Gough v. Crane, 3 Md. Ch. 119; Crane v. Gough, 4 Md. Ch. 316; 2 Dart V. & P. (4th Eng. ed.) 816 *et seq.* Such a settlement, in consideration of marriage, is valid against creditors, though the settlor is in debt at the time. Turner v. Tresevant, 2 Desaus.

after a marriage in Scotland will not be so deemed, although the marriage is after the settlement recelebrated in England.(*l*) A husband acquiring an estate merely in his marital right, is not a purchaser within the meaning of the statute.(*m*)

* 11. The marriage consideration runs through the whole settlement as far as it relates to the husband, and wife, and issue ;(*n*) but the marriage consideration will not extend to remainders to collateral relations, so as to support them against a subsequent sale to a *bonâ fide* purchaser,(*o*) although the remainders may of course be contracted for, and so brought within the consideration ;(*p*) and they appear to have been supported where after a *vested* estate tail.(*q*) And they are valid where they are interposed between two limitations to the different classes of issue of the marriage, for that construction is necessary to support the ultimate remainder to the issue of the marriage.(*r*)(1) And where

264 ; *Gassett v. Grout*, 4 Met. 486 ; *Betts v. Union Bank of Maryland*, 1 Harr. & G. 175 ; *Magniac v. Thompson*, 7 Peters (U. S.), 349. It makes no difference whether, at the time of a voluntary settlement, a particular marriage was in contemplation ; it is sufficient if a marriage subsequently takes place induced by the provisions of it. *Sterry v. Arden*, 1 John. Ch. 261. A legal contract and promise of marriage, made in good faith by a woman to one who has executed to her a deed of land, for the purpose of inducing her to marry him, entitle her to hold the land against his creditors, although the marriage is prevented by his death. *Smith v. Allen*, 5 Allen, 454.

(*l*) *Ex parte Hall*, 1 Ves. & Bea. 112 ; see *Adams v. Adams*, 8 Ir. Ch. Rep. 41 ; *Dobbyn v. Adams*, 7 Ir. Ch. Rep. 193.

(*m*) *Doe v. Lewis*, 11 C. B. 1035.

(*n*) *Nairn v. Prowse*, 6 Ves. 752 ; 18 Ves. 92 ; *Lane*, 22 ; 2 Ro. R. 306 ; *Jason v. Jervis*, 1 Ver. 286 ; see *Barham v. Ld. Clarendon*, 10 Hare, 126.

(*o*) *Johnson v. Legard*, Tur. & Rus. 281. [See *Kerr F. & M.* (1st Am. ed.), 232 ; *Smith v. Cherrill*, L. R. 4 Eq. 390. A deed from an uncle to a niece is not supported by the consideration of natural love and affection. *Mark v. Clark*, 11 B. Mon. 44. The consideration applies to relations by affinity. *Bell v. Scammon*, 15 N. H. 381.]

(*p*) 18 Ves. 92 ; *Ford v. Stuart*, 15 Beav. 493.

(*q*) *White v. Stringer*, 2 Lev. 105 ; 2 P. Wms. 255.

(*r*) *Clayton v. Ld. Wilton*, see 3 Mad. 302 ; *Roe v. Mitton*, 2 Wils. 356 ; *Sutton v. Chetwynd*, 3 Mer. 249 ; *Sugd. H. of L.* 153 ; *Llo. & Go. t. Sugd.* 343.

(1) In *Clayton v. Ld. Wilton*, before Lord Eldon, Ch., MS. a man previously to his marriage, had settled an estate to the use of himself for life ; remainder to trustees to preserve ; remainder to the first and other sons of the marriage, successively in tail male ; remainder to the first and other sons of the husband by any after-taken wife, successively in tail male ; remainder to the daughters of the intended marriage, as tenants in common in tail, with cross remainders between them in tail, with reversion to himself in fee. The wife died in her husband's lifetime without issue. The husband, not having been married again, mortgaged the estate. The legal estate was outstand-

the concurrence of several persons is necessary, as in a resettlement by father and son, remainders to collaterals, for example, younger brothers of the son, would be valid as having been in effect contracted for by the father.^(s) But tenant for life and remainder-man cannot resettle the estate *to the survivor* in fee in remainder, so as to prevent them both from selling to a purchaser.^(t) Nor can a voluntary settlement be supported merely because under a prior settlement the grantor was tenant in tail and the grantees were tenants in tail in remainder.^(u) And the * general rule prevails where a *woman's* estate is settled previously to marriage, with remainders to her collaterals, so that she and her husband may destroy them by a sale for value.^(x) Yet in a late case in the exchequer a settlement by a widow, previously to her second marriage, on her illegitimate son, after the deaths of herself and her second husband, was supported against a subsequent mortgage by her and her husband.^(y) The court relied upon *Newstead v. Searle* before Lord Hardwicke, where, however, he considered there was a consideration on the part of the husband; and in *Chapman v. Emery*, Lord Mansfield said he rather doubted Lord Hardwicke's saying, that where a woman

(s) *Osgood v. Strode*, 2 P. Wms. 245; G. 176; *Cramer v. Moore*, 3 Sm. & Gif. Heap *v. Tonge*, 9 Hare, 90; see *Sandeman* 141; *Bartlett v. Bartlett*, 3 Sm. & Gif. *v. Mackenzie*, 1 J. & H. 613. 533, 1 De G. & J. 127.

(t) *Doe v. Rolfe*, 8 Ad. & El. 650; *Tarleton v. Liddell*, 17 Q. B. 390. (y) *Dickenson v. Wright*, 5 H. & N. 401; see *Massey v. Travers*, 10 Ir. C.

(u) *Cormick v. Trapaud*, 6 Dow, 60.

(x) *Cotterell v. Horner*, 13 Sim. 506; L. Rep. 459, which did not admit of argument.
see *Kekewich v. Manning*, 1 De G., M. &

ing, and the question was, whether it was to be conveyed to the mortgagee or not. A case was directed to the king's bench, in which the settlement was stated as a legal settlement; and it was stated, that the settlor had sold for a full and valuable consideration. The judges of B. R. on the 31st May, 1813, certified their opinion, that the conveyance by the plaintiff to the purchaser was *not* a good and valid conveyance against the issue of the plaintiff's second marriage. Therefore the limitations to the collaterals were supported: but it is observable, that in order to support the limitations to the daughters of the first marriage, it was necessary to support the remainders to the sons of the second marriage. That was of itself a sufficient ground to support the remainders. It has, on the same principle, been considered, that an estate to a stranger may be supported, under a covenant to stand seised, if required to give effect to subsequent limitations within the consideration. The same circumstances, precisely, however, appeared to have occurred in *Roe v. Mitton*, but this ground does not appear to have been urged in its support. See *Fairfield v. Birch*, 11th edit. Purch. App. No. 23. The point is considered more fully in former editions.

about to marry a second husband makes a settlement of her estate upon the children by her first husband, such settlement has been held good. The court considered *Johnson v. Legard* counterbalanced by *Clayton and Lord Wilton*, and thought it difficult to see how the children of another marriage were more within the consideration of marriage than the living brothers of the husband, and they added that they had not been referred to any authority bearing directly upon the matter in question. This decision seems to reopen a settled point. *Newstead v. Searle* cannot upon the abstract question be set up against the current of authorities. *Sutton v. Chetwynd* in the House of Lords and *Johnson v. Legard* are conclusive authorities upon the invalidity against a subsequent purchaser or mortgagee of a remainder in a marriage settlement to a person not within the consideration of the marriage, and the courts have considered a settlement by a woman on marriage in which her intended husband concurs, subject to the rule. However difficult it may be to distinguish *Clayton v. Lord Wilton* from the other cases, that case was decided upon the clear distinction already noticed, that the limitation in question required support, in order to give effect to subsequent limitations to the issue of the first marriage. Since the above observations were written the decision in the exchequer has been affirmed in the exchequer chamber by four judges against one, (z) principally upon the authority of *Newstead v. Searle*. One of the learned judges expressed his opinion that the suggestion in this work of the ground upon which *Clayton v. Lord Wilton* was decided could not be maintained, because as there were trustees to preserve contingent remainders this was not necessary, even if the reason itself were sufficient. This does not seem to be a satisfactory explanation; unless *Clayton and Lord Wilton* is an authority in favor generally of limitations to strangers * not within the consideration of the settlement, contrary to all the authorities, it can be supported only on the ground stated, viz., that the limitations to the sons of the second marriage were, as the settlement stood, necessary for the support of the limitations to the daughters of the marriage, and that appears to be a sufficient and satisfactory ground. The limitation to trustees to preserve contingent remainders does not

(z) *Clarke v. Wright*, 6 H. & N. 849.

bear upon the question, because although that would perform its proper office, and secure the contingent estates tail as they arose according to the settlement; yet if the estates in tail male to the sons of the second marriage were void as voluntary against a purchaser, the remainders over to the daughters of the marriage could not have taken effect, for they were to take effect only on the default or failure of issue male of a second marriage. There might have been such issue incapable of taking as against a purchaser, and yet the daughters of the first marriage could not have taken; to give validity in every event, therefore, to the limitation to them, it was necessary to support the previous limitation to the sons of a second marriage.(a)

12. If a written agreement be entered into before the marriage for a settlement of the estate (b) (for a parol agreement will not support a settlement after the marriage),(c) or the husband receive an additional portion with his wife,(d) the settlement, although made after marriage, will be deemed valuable.(d¹) Even an agreement to pay the husband a sum of money as a portion, or a refusal by a trustee to pay the wife's money without a settlement,(e) will support a settlement made after marriage, if the money is paid according to the agreement.(f) So the concurrence of the wife in destroying an existing settlement on her for the benefit of the husband, is a sufficient consideration.(g)

(a) See *Beard v. Westcott*, Tur. & Rus. 25; 5 B. & Ald. 801, where the previous limitations were too remote, Sugd. H. of L. Cas. 313; Sugd. Powers (8th ed.), 508. The writer had considered the point so well settled as not to require the elaborate investigation of it which was contained in some former editions of this work.

(b) *Griffin v. Stanhope*, Cro. Jac. 454; *Sir R. Bovie's case*, 1 Vent. 193, but *qu.* where the agreement before the marriage is by parol; *Randall v. Morgan*, 12 Ves. 74; *Battersbee v. Farrington*, 1 Swan. 106; 1 Wils. 88; Sugd. Pow.; Sugd. H. of L. 53. [The agreement should be in writing. *Reade v. Livingston*, 3 John. Ch. 488; *Caines v. Marley*, 2 Yerger, 582; *Smith v. Greer*, 3 Humph. 118.]

(c) *Spurgeon v. Collier*, 1 Eden, 55; *Warden v. Jones*, 23 Beav. 487; 2 De G. & J. 76, in effect overruling *Dundas v.*

Dutens, 1 Ves. jr. 196; 2 Cox, 235; [see *Caton v. Caton*, L. R. 1 Ch. Ap. 137; S. C. L. R. 2 H. L. 127;] as to a parol agreement by a third party, followed by possession, &c., after marriage, binding the party, see *Surcome v. Pinniger*, 3 De G., M. & G. 571; *Stroughill v. Gulliver*, 27 L. T. 258; *Goldicott v. Townsend*, 28 Beav. 445; Sugd. Pow. (8th ed.) 649.

(d) *Colville v. Parker*, Cro. Jac. 158; *Jones v. Mars h*, For. 64; *Stileman v. Ashdown*, 2 Atk. 477; *Ramsden v. Hylton*, 2 Ves. 304.

(d¹) [*Reade v. Livingston*, 3 John. Ch. 481; *Saunders v. Terrill*, 1 Ired. (Law), 97; *Caines v. Marley*, 2 Yerger, 582; *Smith v. Greer*, 3 Humph. 118; *Blanchard v. Ingersoll*, 4 Dall. 305, note; *Rogers v. Hull*, 4 Watts, 359.]

(e) *Brown v. Jones*, 1 Atk. 188.

(f) S. C.

(g) *Scott v. Bell*, 2 Lev. 70; *Ball v.*

13. And if upon a separation, a friend of the wife's covenant to indemnify the husband against her debts, this will be a sufficient * consideration to uphold a settlement as valuable. *(h)* Indeed, if a person, whose concurrence the parties think essential, join in a settlement, his concurrence will be deemed a valuable consideration, although he did not substantially part with anything. *(i)* But where a resettlement by father and son was fraudulent and void on the father's part, who was a trader, so that the son did not take the interest which the father purported to convey to him, the settlement by the son was held to be voluntary, there having been no other consideration. *(k)* And it should be observed, that the statute of Elizabeth does not affect settlements of personal estate. *(l)*

14. Where a corporation provided a hospital under an act of Parliament, and bought estates for it as an endowment, which by their direction *were conveyed by the sellers to the hospital*, it was held that the *corporation* could not defeat the conveyance by a sale by them to a purchaser. *(m)* But they never had the estates vested in them to convey, and they intended to transfer the rights of the hospital to another estate, and not to defeat them, and they did not follow the estate which had been sold. The case, therefore, does not establish that a voluntary conveyance to an ordinary charity may not be defeated by a subsequent sale for value to a purchaser. *(n)*

Burnford, Pre. C. 113 ; 1 Eq. Ca. Ab. 354, pl. 5 ; Clerk v. Nettleship, 2 Lev. 148 ; see Joyce v. Hutton, 12 Ir. Ch. Rep. 71.

(h) Stephens v. Olive, 2 Bro. C. C. 90 ; King v. Brewer, *Id.* 93, n. ; Ld. St. John v. Ly. St. John, 11 Ves. 526 ; Worrall v. Jacob, 3 Mer. 256.

(i) Roe v. Mitton, 2 Wils. 356 ; Middleton v. Ld. Kenyon, 2 Ves. 391 ; Hill v. Bp. of Exeter, 2 Taunt. 69 ; 18 Ves. 92 ; Gully v. Bp. of Exeter, 5 Bing. 171 ; 2 Moo. & Pa. 105, 266, 276 ; Acraman v. Corbett, 1 J. & H. 410.

(k) Tarleton v. Liddell, 17 Q. B. 390 ; 4 De G. & Sm. 538 ; see Wakefield v. Gibson, 1 Giff. 401.

(l) Sloane v. Cadogan, *inf.* ; Jones v. Croucher, 1 Sim. & Stu. 315 ; [Stone v. Van Heythuysen, 11 Hare, 126 ; Bohn v.

Headley, 7 Harr. & J. 257, 271 ; Sewall v. Glidden, 1 Ala. 53, 61 ; 2 Kent (11th ed.), 441, in note ; Toulmin v. Buchanan, 1 Stewart, 67 ; Davis v. Bigler, 62 Penn. St. 242 ; Teasdale v. Atkinson, 2 Brev. 48 ; Garrison v. Rives, 3 Jones, 85. But see Hudnal v. Wilder, 4 McCord, 295, where it was held that, on the principles of the common law, a fraudulent conveyance of chattels might be avoided by a subsequent purchaser for a valuable consideration. See Shaw v. Levy, 17 Serg. & R. 99 ; Fleming v. Townsend, 6 Geo. 103 ; Harper v. Scott, 12 Geo. 125.]

(m) Att. Gen. v. Corpor. of Newcastle, 5 Beav. 307 ; 12 Cl. & Fin. 402.

(n) Trye v. Corpor. of Gloucester, 14 Beav. 181, 182.

15. Equity will not assist a mere stranger in making good a voluntary settlement upon him, unless the property was so transferred as to create the relation of trustee and *cestui que trust*. In one case, however, a voluntary assignment of an equitable reversionary interest to trustees for a stranger, was established, although as the settlement was merely equitable, the person claiming under it of course had not any right to the property at law.^(o) In one case some thin distinctions were taken on this subject, and an equitable estate regularly transferred in favor of strangers was held to be invalid. This seems open to reconsideration.^(p)

16. A voluntary deed may become good by matter *ex post facto*: (^p¹) as if a man make a feoffment by covin, or without any valuable *consideration, and the feoffee make a feoffment for valuable consideration, the latter will be valid against any later conveyance by the first feoffor for valuable consideration.^(q)

(o) *Sloane v. Cadogan*, Rolls, Dec. 1808, MS. App. Purch. No. 24; *Ex parte Pye*, 18 Ves. 140; *Fenner v. Taylor*, 2 Rus. & My. 195; *Edwards v. Jones*, 2 My. & Cra. 226; *Collinson v. Patrick*, 2 Ke. 123; *Blakely v. Brady*, 2 Dru. & Wal. 311; *M'Fadden v. Jenkyns*, *Meek v. Kettlewell*, 1 Hare, 458, 464; *Beatson v. Beatson*, 12 Sim. 281; 8 Beat. 201; *Keke-wich v. Manning*, 1 De G., M. & G. 176; *Donaldson v. Donaldson*, 1 Kay, 711; *Airey v. Hall*, 3 Sm. & Gif. 315.

(p) *Bridge v. Bridge*, 18 Beav. 315; and see and *qu. Beech v. Keep*, 18 Beav. 285; *Woodford v. Charnley*, 28 Beav. 96, where the mortgagor, the settlor, did not convey the legal estate.

(^p¹) [*Sterry v. Arden*, 1 John. Ch. 261, 271; 4 Kent (11th ed.), 463; *Smith v. Allen*, 5 Allen, 456; *Huston v. Cantril*, 11 Leigh, 136; *Oriental Bank v. Haskins*, 3 Met. 332; *Wood v. Jackson*, 8 Wend. 10, 33; *Holcombe v. Ray*, 1 Ired. (Law), 340, 344; *Brown v. Carter*, 5 Ves. (Sumner's ed.) 879, & note (2) of Mr. Hovenden; *Verplank v. Arden*, 12 John. 536; *Doe v. Howland*, 8 Cowen, 277; *Whelan v. Whelan*, 3 Cowen, 537; *Glidden v. Hunt*, 24 Pick. 225; *Jackson v. Henry*, 10 John. 185, 197; *Argenbright v. Campbell*, 3

Hen. & M. 144; *Magniac v. Thompson*, 7 Peters (U. S.), 348; *S. C. Baldwin v. C. C.* 380; *Hopkirk v. Randolph*, 2 Brock. 133, 147, 148; *Thomas v. Goodwin*, 12 Mass. 140; *Hutchins v. Sprague*, 4 N. H. 469; *Astor v. Wells*, 4 Wheat. 466, 487, 488; *Harvey v. Varney*, 98 Mass. 120; *Drinkwater v. Drinkwater*, 4 Mass. 354; *Crowningshield v. Kittridge*, 7 Met. 520; *Smyth v. Carlisle*, 17 N. H. 417; *Lemay v. Bibean*, 2 Min. 291; *Alexander v. Todd*, 1 Bond (Cir. & Dist.), 175.]

(q) *Prodgers v. Langham*, 1 Sid. 133; *Newport's case*, Skin. 423; *Wilson v. Wormal*, God. 161, pl. 226; *Doe v. Martyr*, 1 New R. 332; *Parr v. Elliason*, 1 East, 92; *Ly. Burg's case*, Mo. 602; 3 Atk. 377. [If the fraudulent grantee conveys the estate to a *bonâ fide* purchaser for a valuable consideration without notice, the conveyance is good, and the first grant will be purged of the fraud. *Wilde J.* in *Oriental Bank v. Haskins*, 3 Met. 332, 339, 340; *Somes v. Brewer*, 2 Pick. 198, 199; *Green v. Tanner*, 8 Met. 411; 1 Story Eq. Jur. § 434; *George v. Kimball*, 24 Pick. 238, 239; *Morton J.*; *Neal v. Williams*, 18 Maine, 391; *Bean v. Smith*, 2 Mason, 252; *Ledyard v. Butler*, 9 Paige, 132, 136; *Wood v. Mann*, 1 Sumner, 509; *Connecticut v.*

17. Lord Eldon applied this rule to persons having only equitable rights.^(r) So if a person is induced to marry a voluntary grantee on account of such provision, the deed, though void in its creation as to purchasers, will no longer remain voluntary; (s) but it becomes unimpeachable only from the date of the matter

Bradish, 14 Mass. 296; Trull v. Bigelow, 16 Mass. 406; Jackson v. Henry, 10 John. 185; Bumperv. Platner, 1 John. Ch. 219; 4 Kent (11th ed.), 464; Kerr F. & M. (1st Am. ed.) 229. Such a purchaser is a favorite in the eyes of a court of equity. 1 Story Eq. Jur. § 434. Although there has been a diversity of opinion upon the point, yet, as a general rule, it is now well established, that a *bonâ fide* purchaser for a valuable consideration without notice, is equally protected, whether he purchases from a fraudulent grantee in a deed to defraud creditors, or one to defraud subsequent purchasers. 4 Kent (11th ed.), 464; Bean v. Smith, 2 Mason, 252; Parker C. J. in *Somes v. Brewer*, 2 Pick. 198; Wilde J. in *Oriental Bank v. Haskins*, 3 Met. 338-340; Green v. Tanner, 8 Met. 420-422; Neal v. Williams, 18 Maine, 391, 392; Anderson v. Roberts, 18 John. 515; S. C. 3 John. Ch. 371; Gordon v. Haywood, 2 N. H. 402; Hood v. Fanestock, 8 Watts, 489; Myers v. Sanders, 7 Dana, 506, 511; Wineland v. Coonce, 5 Misson. 296; Preston v. Crofut, 1 Conn. 527, note; Merrill v. Meachum, 5 Day, 341; Watson v. Dickens, 12 Sm. & M. 608; Reynolds v. Vilas, 8 Wis. 471. It is now the settled American doctrine, that a *bonâ fide* purchaser for valuable consideration, is protected under the statutes of 13 & 27 Eliz. as adopted in this country, whether he purchases from a fraudulent grantor, or a fraudulent grantee. 4 Kent (11th ed.), 464. Where there is a *bonâ fide* purchaser from the voluntary or fraudulent grantor, and another from the voluntary or fraudulent grantee, the *bonâ fide* grantees will have preference, according to the priority of their respective titles. 1 Story Eq. Jur. § 434; Anderson v. Roberts, 18 John. 513; 3 John. Ch. 377, 378; Sands v. Hildreth, 14 John. 498. A purchaser with

notice from a purchaser without notice may avail himself of his grantor's want of notice. Hagthorp v. Hook, 1 Gill & J. 273, 301; 1 Story Eq. Jur. § 409. In regard to a case where a *bonâ fide* purchaser, without notice, from a grantee, to whom property had been conveyed to defraud creditors, was held entitled to retain the same against the creditors of the grantor, Mr. Justice Story said: "Will not a court of equity decree that the fraudulent grantee shall account to the judgment creditor for the amount of the proceeds of the sale, considering them as a mere substitution for the original fund? It appears to me that such a course is within the established doctrine and practice of the court." Bean v. Smith, 2 Mason, 274, 275; 1 Story Eq. Jur. § 423; 2 Ib. § 1258; Clark v. Jones, 5 Allen, 380, 381. And in Robinson v. Boyd, 17 Mich. 128, it was more distinctly held, that the fraudulent grantee, in such case, will be liable to the creditors of the debtor for the value of the property conveyed, whether he succeeds in collecting the price for which he sold it or not. The same principle was maintained in May v. Le Claire, 11 Wallace, 217, 235, 236; see Oliver v. Piatt, 3 How. (U. S.) 333.]

(r) George v. Milbanke, 9 Ves. 190; 1 Mer. 638; 7 Cl. & Fin. 463; so as to goods, Morewood v. South York Ry. Co. 3 H. & N. 798.

(s) Prodgers v. Langham, 1 Sid. 133; Kirk v. Clark, Pre. C. 275; S. C. Heisier v. Clark, 2 Eq. Ca. Ab. 46; Doe v. Routledge, Cow. 705; E. I. Co. v. Clavell, Gil. E. R. 37; Pre. C. 377; 9 Ves. 193; O'Gorman v. Comyn, 2 Sch. & Lef. 147; Crofton v. Ormsby, Ib. 583; Payne v. Mortimer, 1 Giff. 118, 4 D. G. & J. 447; [Sterry v. Arden, 1 John. Ch. 261; Kerr F. & M. (1st Am. ed.) 229.]

ex post facto.(t) And it must be presumed that the parties did act upon the provision.(u)

18. Notwithstanding the decisions as to voluntary settlements, it is seldom that a purchaser can be advised to accept a title where there is a prior settlement; for although apparently voluntary, yet if a valuable consideration were paid or given, parol evidence would be admissible of the transaction, in order to support the deed, and rebut the supposed fraud; (x) yet in the absence of some proof, the objection could not be maintained.(y) If the settlement be for a nominal consideration and divers other good and valuable considerations, the court, in favor of a purchaser, will inquire into the nature of the consideration.(z)

19. A contract to sell the settled estate to a person with full notice of the voluntary settlement will be enforced at the suit of the purchaser,(a) but the seller cannot himself compel a specific performance of the contract.(b)(1)

(t) *O'Donovan v. Rogers*, 7 Ir. Ch. Rep. 1.

(u) *Brown v. Carter*, 5 Ves. 862; *Roddy v. Williams*, 3 J. & L. 1; *Hoghton v. Hoghton*, 15 Beav. 316.

(x) *Chapman v. Emery*, Cowp. 278; *Ferrars v. Cherry*, 2 Ver. 384; *Scnhouse v. Earle*, Amb. 285; 2 Ves. 60, n. *Purch.* 928; *Pott v. Todhunter*, 2 Col. 76; *Clifford v. Turrell*, 1 Yo. & Col. C. C. 138; 9 Jur. 633 *aff'd*; [2 *Dart V. & P.* (4th Eng. ed.) 823; *Townend v. Toker*, L. R. 1 Ch. Ap. 446, 459. In this last case it appeared that an agreement was entered into between a lady, who was entitled in fee to an estate subject to mortgages, and her nephew, that she should come and live with him, and that he should remove into a larger house for the purpose, she contributing a yearly sum toward the housekeeping. The nephew agreed to this, provided she would settle the estate, limiting it to him after her death; she assented, and a settlement was accordingly executed, by which the nephew covenanted to indemnify her from all liability in respect of the mortgages. He removed to a larger house at considerable expense, and they lived to-

gether for some time. The aunt afterwards ceased to live with the nephew, and agreed to sell the estate to a purchaser, who filed a bill against the aunt and nephew for specific performance. Upon these facts, it was held that the settlement was not voluntary; the covenant of indemnity and the expenses incurred by the nephew on the faith of the settlement being severally sufficient to support it as made for value.]

(y) *Butterfield v. Heath*, 15 Beav. 408. In *Buckle v. Mitchell*, the purchaser claimed the benefit of the purchase, see 15 Beav. 414.

(z) *Kelson v. Kelson*, 10 Hare, 385.

(a) *Buckle v. Mitchell*, 18 Ves. 101. The early cases are *Leach v. Dean*, 1 Ch.

(b) *Burke v. Dawson*, Rolls, March 1805, MS. where Sir W. Grant expressed the opinion upon which he acted in *Smith v. Garland*, 2 Mer. 123; *Johnson v. Legard*, MS. 3 Mad. 283; 1 *Tur. & Rus.* 281; *Davenport v. Bishopp*, 2 Yo. & Col. C. C. 451; 1 *Phil.* 698; *Sugd. H. of L.* 153; *Campbell v. Ingilby*, 1 *De G. & J.* 393.

(1) In *Johnson v. Legard*, the settlement was in consideration of a marriage, and was not voluntary throughout. By a later agreement in writing, Sir John Legard

* 20. A trust created by a voluntary settlement will of course be carried into execution; (b¹) but an injunction will not be granted

R. 78; *Douglas v. Ward*, 1 Ch. C. 79; *Parry v. Carwarden*, Dick. 544; *Bennet v. Musgrove*, 2 Ves. 51; *Oxley v. Lee*, 1 Atk. 625; see *Metcalf v. Pulvertoft*, 1 Ves. & Bea. 180; *Williams v. Busby*, 5 Beav. 193; *Stackpoole v. Stackpoole*, 4 Dru. & War. 320; *Lister v. Turner*, 5 Hare, 281; *Daking v. Whimper*, 26 Beav. 568. [And in such a suit, it appears that the purchaser is entitled to have the question tried whether the settlement is voluntary or not; and it is said by Turner L. J. to have been the constant practice of the court to make persons interested under settlements alleged to be voluntary, parties to suits of this description. *Townend v. Toker*, L. R. 1 Ch. Ap. 457, 458.]

(b¹) [See *Bunn v. Winthrop*, 1 John. Ch. 329; *Minturn v. Seymour*, 4 John. Ch. 498, 500; *Dennison v. Goehring*, 7 Barr, 175, 178; *Tolar v. Tolar*, 1 Dev. Eq. 456. Mr. Perry, in his work on Trusts, states the doctrine thus: "If the trust is *perfectly created*, so that the donor or settlor has nothing more to do, and the person seeking to enforce it has need of no further conveyances from the settlor, and nothing

is required of the court but to give effect to the trust as an executed trust, it will be carried into effect, although it was without consideration, and the possession of the property was not changed." *Perry Trusts*, § 98; see also *Stone v. Hackett*, 12 Gray, 227; *Lane v. Ewing*, 31 Missou. 75; *Wright v. Miller*, 4 Seld. 9; *Andrews v. Hobson*, 23 Ala. 219; *Graham v. Lambert*, 5 Humph. 595; *Henson v. Kinard*, 3 Strobb. Eq. 371; *Cox v. Sprigg*, 6 Md. 274; *Kirkpatrick v. McDonald*, 1 Jones, 387; *Keckewich v. Manning*, 1 De G., M. & G. 176, note (1), 188, notes (1) & (2). In some cases, in the United States, where provision has been made for a wife or child in an instrument under seal, the consideration has been regarded as sufficiently meritorious to lead to the enforcement of an executory agreement on trust. *McIntire v. Hughes*, 4 Bibb, 186; *Dennison v. Goehring*, 7 Barr, 175, 179; *Caldwell v. Williams*, 1 Bailey Eq. 175, 176; *Garner v. Garner*, 1 Bu-h Eq. 1; *Jones v. Obinchain*, 10 Grattan, 259; *Mahan v. Mahan*, 7 B. Mon. 579; *Bright v. Bright*, 8 B. Mon. 191; *Taylor v. James*, 4 Des.

agreed to sell the estate to Mr. Watt, with special provision in case the purchaser should be evicted. Sir John died, and his creditors filed a bill against the remaindermen under the settlement, and against Watt, for a specific performance. Watt submitted to perform the agreement on having a good title. A case was sent to the king's bench, whether the limitations to the collaterals were good against the purchaser. The king's bench decided against the validity of the limitations as against the purchaser. The cause came on before Sir John Leach. The counsel for the remaindermen relied upon the case of *Smith v. Garland*, which had been decided since the case was directed to the king's bench. The vice chancellor held that that case was not an authority to be followed, and was of opinion that the creditors might file a bill, although the settlor could not, as there was a moral obligation on him to provide for his debts, and that the court could make a decree between the co-defendants; and he held that the statute of Elizabeth did not confine the relief to a purchaser by conveyance, but the act supposed there may be a purchaser by contract. The purchaser's right follows as against the representatives of the vendor. He thought that the creditors would have a right to insist upon a specific performance, though the vendor had not; but that point did not arise, as Watt said he was ready to take the estate if a good title could be made. The defendants, the remaindermen, appealed to the lord chancellor against this decision, and the decree below was reversed.

restraining the settlor from defeating the settlement by a sale; (c) nor will the pendency of the suit prevent the settlor from selling the property, or the purchaser from filing a bill in order to enforce his rights under the contract.(d)

21. II. As to conveyances with power of revocation: The statute does not extend to particular powers, as a power to charge 2,000*l.* on an estate of considerable value.(e) But of course a settlement by which a power of revocation, or a power tantamount to it, is reserved to the grantor, is void against a subsequent purchaser,(f) and no artifice of the parties can protect the settlement; e. g. a conditional power, that the settlor shall pay a trifling sum to a third person,(g) or a condition, that the consent of a third person appointed by the grantor shall be obtained.(h) But a settlement with a power to the settlor to revoke, so that the money be paid to trustees to be invested in the purchase of other estates,(i) or to revoke with the consent of a stranger *bond fide* appointed by the parties, would be valid.(k) And it is immaterial whether the original settlement was voluntary or upon valuable consideration.(l)

22. If a man having a power at a future day to revoke a settlement sell before the day arrive, the settlement will be void against the purchaser at the time when the vendor, according to the terms * of the power, *might* have revoked the settlement.(m)

5; *Shepherd v. Bevin*, 4 Md. Ch. 133; 200. [See 1 Story Eq. Jur. § 433, & *Harris v. Haines*, 6 Md. 435; *Pennington* note.]

v. Gittings, 2 Gill & J. 208; *Hayes v. Ker-* (e) *Jenkins v. Keymis*, 1 Lev. 150.

shaw, 1 Sandf. 258; *Blackely v. Holton*, (f) *Cross v. Faustenditch*, Cro. Jac.

5 Dana, 520; *Thompson v. Thompson*, 2 180; *Tarback v. Marbury*, 2 Ver. 510;

How. (Miss.) 737; *Woodson v. McClel-* Lanè, 22. [See *Slater v. Dudley*, 18 Pick.

land, 4 Miss. 495; 1 Lead. Cas. in Eq. 273, *Riggs v. Murray*, 2 John. Ch. 565,

(3d Am. ed.) 330-333; *Perry Trusts*, § 579, 580; 2 Dart V. & P. (4th Eng. ed.)

109; *Scales v. Maude*, 6 De G., M. & G. 825, 826.]

43 *Jones v. Lock*, L. R. 1 Ch. Ap. 28; (g) *Griffin v. Stanhope*, Cro. Jac. 454.

Keckewich v. Manning, 1 De G., M. & G. (h) 3 Rep. 82 b; *Lavender v. Black-*

(Am. ed.) 176, note (1), 188, notes (1) & ston, 3 Keb. 526.

(2).] (i) *Doe v. Martin*, 4 Term. R. 39.

(c) *Pulvertoft v. Pulvertoft*, 18 Ves. (k) *Leigh v. Winter*, 1 Jo. 411; Lane,

84. 22.

(d) *Metcalfe v. Pulvertoft*, 1 Ves. & (l) *Buller v. Waterhouse*, 2 Jo. 94; 3

Bea. 180. The widow pleaded *lis pendens*, *Keb*. 751; *Hungerford v. Earle*, 2 Free.

and the plea was overruled by the V. C. 120; Lane, 22.

10th August, 1813; see 2 Ves. & *Bea*. (m) *Mo*. 618; 3 Rep. 82 b; *Bridg*. 23.

And a settlement with power of revocation will be void against a subsequent purchaser, although the grantor release or extinguish the power previously to the sale.⁽ⁿ⁾ But if a settlement should be made for valuable consideration, with a power of revocation, and the vendor should afterwards release the power for a valuable consideration, a purchaser, subsequently to the destruction of the power, could not prevail over the settlement.⁽¹⁾

SECTION II.

OF PROTECTION FROM CHARITABLE USES.

- | | |
|--|--|
| 1. Purchaser without notice protected.
— Inadequate consideration. — Rent-charge. | 2. Notice to first purchaser binds all.
3. And length of possession will not support his title. |
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1. In the statute of charitable uses *(a)* is a proviso, that no person who shall purchase or obtain, upon valuable consideration of money or land, any estate or interest of or in any lands, &c., that shall be given to any of the charitable uses mentioned in the statute, without fraud or covin (*having no notice of the same charitable uses*), shall be impeached by any decrees of the commissioners therein mentioned. But a purchaser who buys for an inadequate consideration is not within this proviso.^(b) Where a rentcharge is legal, it must, like every other *legal* incumbrance, bind the purchaser, although he purchased without notice; but where it is a mere equitable charge, the purchaser without notice is not to be affected.^(c)

(n) *Bullock v. Thorne*, Mo. 615.

(b) *Duke*, 177.

(a) 43 Eliz. c. 4. For the present administration of charities, see 16 & 17 Vict. c. 137, 18 & 19 Vict. c. 124.

(c) *Duke*, 64; *Toth*. 226.

(1) For the effect of the omission of a power of revocation in a voluntary settlement, see *Anderson v. Elsworth*, 3 Giff. 154. [A purchaser for value of real estate cannot come into the court of chancery to have a prior voluntary deed void under 27 Eliz. c. 5, delivered up to be cancelled. The court, in such a case, leaves both parties to their legal rights and remedies. *De Houghton v. Money*, 35 Beav. 98; see *Thayer v. Smith*, 9 Met. 469; *Woodman v. Saltonstall*, 7 Cush. 181; *Pratt v. Pond*, 5 Allen, 59; *Hubbell v. Currier*, 10 Allen, 333; but see *Bean v. Smith*, 2 Mason, 252.]

2. If the first purchaser gave a valuable consideration, and yet had notice, all that claim in privity under his estate and title, whether they have notice or not, will be bound by the decrees of the commissioners.(d) In other respects the common rules as to notice seem to prevail in the construction of the act; (e) for as Lord Talbot observed, a charity is entitled to no favor against a purchaser for valuable * consideration; that equal justice was to be done to a charity, and the estate of every private man, and that whatever did belong to a charity ought to be decreed to it. But that if any man, for a valuable consideration, and without notice or fraud, obtained such an estate, there was no reason to take it away. That he sat there to do justice to all, and not to oppress any man for the sake of a charity, and that to take an estate out of the hands of such a purchaser was just as honest as to rob in favor of a charity; perhaps such a man might be called a good man, but he could never esteem him an honest man.(f)

3. But if a man purchased with notice, length of possession will not support his title.(g)

SECTION III.

OF PROTECTION FROM ACTS OF BANKRUPTCY,(1) AND FROM JUDGMENTS, CROWN DEBTS, AND LIS PENDENS.

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|---|---|
| 1. Purchasers without notice protected. —
Purchasers with notice, after twelve
months from bankruptcy.
2. Notice to agent of corporation, &c., suf-
ficient.
3. What is not notice.
4. Defects in proceedings not to affect pur-
chasers after a limited time. | 5. Bankrupts' estates vest in assignees. —
Copyholds.
6. Agreement by bankrupt to purchase
may be ordered to be delivered up. —
Bankrupt may be ordered to join in
conveyance.
7. Certificate of appointment of assignees
to be registered.
8. Judgments, crown debts, <i>lis pendens</i> . |
|---|---|

(d) East Greenstead's case, Duke, 64, 173.

(e) *Ib.* Att. Gen. v. Hall, 16 Bcav. 388.

(f) Att. Gen. v. Ld. Gower, 2 Eq. Ca. Ab. 195, pl. 16.

(g) Att. Gen. v. Christ's Hosp. 3 My. & Ke. 344; see now 3 & 4 W. 4, c. 27.

(1) As to conveyances to creditors valid against insolvency as being made for valuable consideration, see *Stuckey v. Drewe*, 2 My. & Ke. 190; *Arnell v. Bean*, 8 Bing. 87; 1

1. VARIOUS provisions were made from the time of James the First to protect to a limited extent purchasers from prior acts of bankruptcy, but it was not until the second of Victoria that purchasers were fully protected against any prior act of bankruptcy, provided that they had not notice of any prior act of bankruptcy committed by the seller; (a) and by other acts contracts and payments were protected. But by the consolidation act of 1849, these provisions were repealed, and with respect to transactions with the bankrupt and executions against his property up to the time of the bankruptcy, *or within a limited time previously thereto, it is enacted (b) that all payments really and *bonâ fide* made by any bankrupt or by any person on his behalf, before the date of the fiat or the filing of a petition for adjudication of bankruptcy, to any creditor of such bankrupt, and all payments really and *bonâ fide* made to any bankrupt before the date of the fiat or the filing of such petition, and all conveyances by any bankrupt *bonâ fide* made and executed before the date of the fiat or the filing of such petition, and all contracts, dealings, and transactions by and with any bankrupt really and *bonâ fide* made and entered into before the date of the fiat or the filing of such petition, and all executions and attachments against the lands and tenements of any bankrupt *bonâ fide* executed and levied by seizure and sale before the date of the fiat or the filing of such petition, are to be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person so dealing with or paying to or being paid by such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such payment, conveyance, contract, dealing, or transaction, or at the time of so levying such execution or attachment, or at the time of mak-

(a) 2 Vict. c. 11, s. 12; 7 & 8 Vict. c. Ireland; as to payments under the old 90, Ireland; 21 Jac. 1, c. 19, s. 14; 46 acts, see 6 Geo. 4, c. 16, s. 81, 82; 2 & 3 Geo. 3, c. 135; 49 Geo. 3, c. 121; 6 Geo. Vict. c. 29, s. 1; Shaw v. Botley, 4 B. 4, c. 16; 1 & 2 W. 4, c. 56; 3 & 4 W. 4, & Ad. 801; Willis v. Bank of England, 4 Ad. & El. 21; Cannan v. Denew, 10 c. 47; 6 W. 4, c. 14.

(b) 12 & 13 Vict. c. 106, s. 133, which Bing. 292; Wright v. Fearnley, 5 Bing. section is not repealed by 24 & 25 Vict. c. N. C. 89; Turquand v. Vanderplank, 10 134, see Sched. G. 12 & 13 Vict. c. 107, M. & W. 180.

Moo. & Sco. 151; Margareson v. Saxton, 1 Yo. & Col. 525. [See Denny v. Dana, 2 Cush. 160, 171; Penniman v. Cole, 8 Met. 496.]

ing any sale thereunder, notice of any prior act of bankruptcy by him committed; but validity is not thereby given to any fraudulent preference; (c) and no purchase from any bankrupt *bonâ fide* and for valuable consideration, where the purchaser had notice at the time of such purchase of an act of bankruptcy is to be impeached by reason thereof, unless a fiat or petition for adjudication has been sued out or filed within twelve months after such bankruptcy. (d)

2. If any accredited agent of any body corporate or public company shall have had notice of any act of bankruptcy, such body corporate or company is to be deemed to have had such notice. (e)

3. A purchaser was held by notice to have forfeited the benefit of the 21 Jac. 1, (f) although that act was silent on the subject. Romilly's act (g) only protected a purchaser who had not notice of a prior act of bankruptcy, and it made certain acts amount to notice. The 6 Geo. 4, in like manner, only protected purchasers who had not notice. The later acts lay down the same rule: a purchaser must not *have had notice to entitle him to claim the benefit of those acts; but they contain no provision as to what shall be deemed notice, beyond what has been stated as to an agent of a corporation or public body. Neither an act of bankruptcy nor a petition is of itself notice, and indeed the acts assume that an act of bankruptcy is not notice, nor would the Gazette be constructive notice of an act of bankruptcy, (h) nor is notice of a docket having been struck of itself notice of a prior act of bankruptcy. (i)

4. No title to any real or personal estate sold under any bankruptcy is to be impeached by the bankrupt, or any person claiming under him, in respect of any defect in the fiat or petition for

(c) 2 & 3 Vict. c. 29, s. 1, repealed; *Thibault v. Gibson*, 12 M. & W. 88; *Cheston v. Gibbs*, 12 M. & W. 111; *Conway v. Nall*, 1 C. B. 643.

(d) 12 & 13 Vict. 106, s. 134; see s. 88; which sections are not repealed by 24 & 25 Vict. c. 134, see Sched. G; 6 Geo. 4, c. 16, s. 86; 2 Vict. c. 11, s. 13, repealed.

(e) 12 & 13 Vict. c. 106, s. 87, which is still operative.

(f) 21 Jac. 1, c. 19 s. 14.

(g) 46 Geo. 3, c. 135; 49 Geo. 3, c. 121, s. 2.

(h) 4 B. & Ald. 530.

(i) *Hocking v. Acraman*, 12 M. & W. 170; *Ramsey v. Eaton*, 10 M. & W. 22; *Spratt v. Hobhouse*, 4 Bing. 173; *Willis v. Bank of England*, 4 Ad. & El. 21; *Green v. Laurie*, 1 Ex. 335; as to notice to the attorney, *Pike v. Stephens*, 12 Q. B. 465; or to a clerk, *Pennell v. Stephens*, 7 C. B. 987.

adjudication, or in any of the proceedings under the same, unless the bankrupt shall within the time allowed by the act have commenced proceedings to dispute, dismiss, or annul the fiat, petition, or adjudication, and duly prosecuted the same. *(k)*

5. Before closing this section, we may observe, that all the estates of a bankrupt, and all which he may acquire or which may come to him before his certificate, will vest in his assignee for the time being without any conveyance; *(l)* and the assignee may execute powers which the bankrupt might legally execute for his own benefit (except the right of nomination to any vacant ecclesiastical benefice). *(m)* And the clauses in the substitution for recoveries act relating to estates tail in bankrupts are adopted by reference in the late act. *(n)* The power of the court over the copyhold or customary-hold lands of the bankrupt, we have already seen; *(o)* but the purchaser is, before he enters or takes any profit, to pay the fines and fees, &c., and the lord is then to admit him. *(p)*

6. There is a provision that if any bankrupt has entered into an agreement for the purchase of an estate, the vendor, if the assignee upon being required will not elect whether he will execute or abandon the agreement, may apply to the court, and the court may order the assignee to deliver up the agreement and the possession to the vendor, or may make such other order as the court may think fit; *(q)* and, as we have before seen, the court may order a bankrupt to join in the conveyance to a purchaser. *(r)*

* 7. Where according to law any conveyance or assignment of any real or personal property of a bankrupt would require to be registered, enrolled, or recorded in any registry office, in every such case the certificate of the appointment of assignees of the estate and effects of the bankrupt is to be registered in the reg-

(k) 12 & 13 Vict. c. 106, s. 131, 104; not repealed by 24 & 25 Vict. c. 134, see Sched. G., see s. 108, 114, 115, 117; 6 Geo. 4, c. 16, s. 87, repealed; Gould v. Shoyer, 6 Bing 738.

(l) S. 142, not repealed; see 24 & 25 Vict. c. 134, s. 229 — meaning of, "Property."

(m) S. 147.

(n) S. 208; 3 & 4 W. 4, c. 74, s. 56-69; s. 71-73.

(o) 24 & 25 Vict. c. 134, s. 114; that Act repealed s. 209 of 12 & 13 Vict. c. 106.

(p) S. 210, not repealed.

(q) S. 146, not repealed.

(r) S. 148, not repealed.

istry office, court, or place wherein such conveyance or assignment would require to be registered, and such registry will have the like effect as the registry would have had; and the title of any purchaser of any such property for valuable consideration without notice of the bankruptcy, who shall have duly registered his purchase deed previous to the registry thereby directed, is not to be invalidated by reason of such appointment of assignees or of the vesting of such property in them consequent thereupon, unless the certificate of such appointment shall be registered as aforesaid within two months from the date of such appointment, as regards Great Britain and Ireland.(s)

8. We have already considered so fully the laws relating to judgments (t) and to *lis pendens*,(u) that we need here only refer to those observations. We have also sufficiently referred to the provisions for registering crown debts for the safety of purchasers,(x) and for facilitating a sale where the crown debt is not wholly discharged.(y)

SECTION IV.

OF PROTECTION FROM UNREGISTERED DEEDS, ETC.

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| <ol style="list-style-type: none"> 1. Deeds and wills in York, Kingston-upon-Hull, and Middlesex to be registered. 2. Deeds not registered void against purchasers. — So devises. — And judgments. 3. An appointment must be registered. — So must a lease, although assignment of it is registered. — Assignment of legacy not. 4. Settlement by a woman must be registered to prevent charges by her husband. — Two successive grants without | <ol style="list-style-type: none"> registry, and grant by the second grantee to one who registers. 5. Further advance by mortgagee without notice of second registered mortgage, valid. — Purchaser without notice not bound by prior equitable registered incumbrance. — Purchaser with notice bound by unregistered deed. * 6. Operation of Irish act on equitable estates. 7. Memorial, how to be framed. — A witness to the deed must be a witness to the memorial. — Execution of memo- |
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(s) 12 & 13 Vict. c. 106, s. 143, not repealed; *sup.* ch. 13, s. 1; 5 & 6 Vict. c. 116, s. 8.

(t) *Sup.* ch. 13, s. 1.

(u) *Sup.* *Ib.*

(x) *Sup.* *Ib.*

(y) *Sup.* *Ib.* Formerly a purchaser could not be compelled to take the title unless a quietus had been entered up on record. *Breakspear v. Innes*, V. C., Master of the Rolls, MS.

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| <p>rial by representatives. — Deed of corporation. — Writs of execution, &c.</p> <p>8. Necessary contents of memorial.</p> <p>9. }</p> <p>10. } Description of parcels.</p> <p>11. Copyholds excepted: leases by license. — Leases at rack-rent excepted. — So</p> | <p>leases not beyond twenty-one years with possession and occupation: sale: mortgage. — Serjeant's Inn excepted.</p> <p>12. Registry under 25 & 26 Vict. c. 53.</p> <p>13. Registry of appointments of assignees of insolvents and bankrupts.</p> |
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1. THE register counties are Middlesex,(a) York,(b) and Kingston-upon-Hull.(c) But it will here be sufficient to state the law as particularly bearing upon purchasers.(1)

2. Both deeds (c¹) and wills (c²) are made void against a sub-

(a) 7 An. c. 20.

(b) 2 & 3 An. c. 4; 4 An. c. 18; 6 An. c. 35; 8 Geo. 2, c. 6.

(c) 6 An. c. 35.

(c¹) [In all of the States of the Union there are provisions made by statute for recording all deeds and conveyances of land upon previous acknowledgment or proof. This acknowledgment seems to be universally required, in conveyances of estates of freehold, to render them admissi-

ble to record, except in certain cases, in which provision is made for the solemn proof of their execution, either by the subscribing witnesses, or in case of their death or absence, by other witnesses, before they can be admitted to registration. 2 Cruise Dig. by Mr. Greenleaf, vol. 4, tit. 32, ch. 29, § 1, in-note; 4 Kent (11th ed.), 456, 457. Either an attesting witness, or the acknowledgment of the grantor, is requisite to registration in New York

(c²) [In many of the United States, wills of real as well as of personal estate are required by statute to be proved and recorded in the probate court, or other court having like jurisdiction. See 1 Jarman Wills (4th Am. ed.), 218 *et seq.* & notes; 3 Cruise Dig. by Mr. Greenleaf, vol. 6, tit. 38, ch. 1, § 27 in note; Boyce v. Rossborough, 3 De G., M. & G. (Am. ed.), 617, note (1), and cases cited. In Massachusetts, Maine, Vermont, New Hampshire, and Michigan, it is expressly provided by statute, that "no will shall be effectual to pass either real or personal estate, unless it shall have been duly approved and allowed in the probate court." Such is also the law in Ohio, in Rhode Island, and probably in some other States. 1 Jarman Wills (4th Am. ed.), 218, & notes. In Shumway v. Holbrook, 1 Pick. 114, it was held that a will may be proved in the probate court at any time, even after the lapse of twenty years, for the

purpose of establishing a title to real estate. In Georgia, wills are required to be registered within three months from the death of the testator, on failure of which they shall be deemed and construed to be void and of no effect. Probate is, however, operative merely, as the authenticated evidence, and not at all as the foundation of the title to the property disposed of by the will. The title passes to the legatee or devisee at the death of the testator, and the probate of the will relates back to that time. The will before probate, is in no judicial sense a nullity. The probate ascertains nothing but the original validity of the will as such, and that the instrument is in fact, what on its face it purports to be. *Ex parte Fuller*, 2 Story, 327; *Spring v. Parkman*, 3 Fairf. 127; *Strong v. Perkins*, 3 N. H. 517, 518; *Hall v. Ashley*, 9 Ohio, 96; *Fleeger v. Poole*, 2 McLean, 189.]

(1) Bills of sale of personal chattels are now made void unless a memorial be filed in like manner as warrants of attorney, 17 & 18 Vict. c. 36, England; c. 55, Ireland.

sequent purchaser, unless a memorial be registered as directed by the acts. And judgments (except to the crown) are likewise required to be registered to bind a purchaser.(1)

and Massachusetts, and two witnesses or the like acknowledgment, are deemed requisite in the States of Indiana, Tennessee, Kentucky, Delaware, and South Carolina. In several of the States two attesting witnesses are essential to the complete validity of every deed of conveyance, as, in New Hampshire, Vermont, Connecticut, Georgia, Florida, Ohio, Michigan, Illinois, Indiana, and Arkansas. And Chancellor Kent suggests that it is probable that the deed would not be deemed sufficiently authenticated for recording, without the signature of the two witnesses, 4 Kent (11th ed.), 457. But aside from the formalities necessary for obtaining registration, the common law requires no attesting witnesses to a deed for the conveyance of land. *Dole v. Thurlow*, 12 Met. 157, 165, 166; *Carrico v. The Farmers' & Merchants' National Bank*, 33 Md. 244, 245; *Wiches v. Caulk*, 5 Harr. & J. 36. In some of the States powers of attorney to convey must be attested and in other respects executed with the same formalities as deeds of conveyance. Such is the case in New Hampshire, Vermont, Connecticut, and Missouri. 2 Cruise Dig. by Mr. Greenleaf, vol. 4, tit. 32, ch. 2, § 77, in note; *Graves v. Ward*, 2 Duvall (Ky.), 301. But as to Massachusetts, see *Valentine v. Piper*, 22 Pick. 85, where it was held that such powers of attorney need not be acknowledged and recorded. An acknowledgment by any one of several grantors is sufficient in Massachusetts; Gen. Sts. c. 89, s. 18; and this though one is the wife of another grantor, and the husband is the party acknowledging, he having an inchoate right by the curtesy. *Palmer v. Paine*, 9 Gray, 56. This was so held before this statute. *Catlin v.*

Ware, 9 Mass. 218; *Shaw v. Poor*, 6 Pick. 86. The acknowledgment being a mere ministerial act, may be taken by a justice of the peace out of his county. *Haskell v. Haven*, 3 Pick. 404; *Learned v. Riley*, 14 Allen, 109; *Odiorne v. Mason*, 9 N. H. 30; but see *Graham v. Anderson*, 42 Ill. 514; *Hill v. Bacon*, 43 Ill. 477. The record of a deed of land, which has been admitted to registration without having been duly acknowledged before a magistrate, is of no validity or effect, and a deed for that or any other reason illegally recorded, is not even constructive notice to third persons. *Blood v. Blood*, 23 Pick. 80; *De Witt v. Moulton*, 17 Maine, 418; *McNeil v. Magee*, 5 Mason, 244; *Sigourney v. Larned*, 10 Pick. 72; *Shultz v. Moore*, 1 McLean, 520; 4 Kent (11th ed.), 174; *post*, 761, *note*; *Racouillat v. Rene*, 32 Cal. 450; *Ely v. Wilcox*, 20 Wis. 523. But a certificate of acknowledgment is presumed to be correct. *Dresel v. Jordan*, 104 Mass. 417. There is, likewise, a fixed period of time allowed, in many of the States, for registration of deeds; as, for instance, one year in Delaware, eight months in Virginia, and Kentucky, six months in Pennsylvania, Maryland, and South Carolina; two years in North Carolina; three months in Mississippi, Alabama, and Missouri; ninety days in Indiana, and fifteen days in New Jersey. 4 Kent (11th ed.), 457; 2 Cruise Dig. by Mr. Greenleaf, vol. 4, tit. 32, ch. 29, § 1, in note. It is supposed, that in these cases, where a time is fixed within which deeds shall be registered, if they are registered within that time, they will operate from the time of their execution and delivery. So, in some States, where there is no prescribed time, and it is held they shall be recorded within

(1) Judgments do not bind glebe lands, but they are bound by the delivery of the writ, consequently the judgment need not be registered; *Cottle v. Warrington*, 2 Nev. & Man. 227.

3. A deed of appointment under a power must be registered,^(d) and so must a lease, although an assignment reciting it is regis-

a reasonable time; if so recorded it is supposed they will operate from their execution. 4 Kent (11th ed.), 457; 2 Cruise Dig. by Mr. Greenleaf, vol. 4, tit. 32, ch. 29, § 1, in note; *Brown v. Balridge*, 1 Meigs, 1; *Den v. Rickman*, 1 Green, 43; *Beers v. Hawley* 2 Conn. 467; *Bissell v. Nooney*, 33 Conn. 411. But in Massachusetts and some other States, reasonable time is not considered; *Cushing v. Hurd*, 4 Pick. 257; but priority is given to the conveyance which shall be first recorded; and it is regarded as recorded when delivered to the registry for that purpose; *Cook v. Hall*, 1 Gilman, 575; 4 Kent (11 ed.), 458; *Kiser v. Heuston*, 38 Ill. 252, note, and in Pennsylvania, of deeds not recorded within the time prescribed by law, that takes priority which is first recorded. *Lightner v. Mooney*, 10 Watts, 407; *Ebner v. Goundie*, 5 Watts & S. 49. So in Alabama; *Mallory v. Stodder*, 6 Ala. 801. So in Tennessee; *Miller v. Estell*, 8 Yerger, 452; but see *Garnett v. Stockton*, 7 Humph. 84. So in Ohio; *Northrup v. Brehmer*, 8 Humph. (Ohio) 392. So in Mississippi; *McRaven v. McGuire*, 9 Sm. & M. 34. In Georgia, deeds, not recorded within the time prescribed by law, give no priority by subsequent registry over deeds not recorded. *Doe v. Reddin, Dudley* (Geo.), 177. But in Indiana the record of a conveyance after the time prescribed by law, will constitute notice, to all purchasers, after the conveyance is so placed on the record. *Meni v. Rathbone*, 21 Ind. 454. In some of the States a difference is made between the time of recording mortgages and other deeds. See 2 Cruise, by Mr. Greenleaf, vol. 4, tit. 32, ch. 29, § 1, note, 1 *Id.* vol. 2, tit. 15, ch. 5, § 50, in note; 4 Kent (11th ed.), 168 *et seq.* Under the proviso of the Pennsylvania statute of March 28, 1820, mortgages given for the purchase money of the lands mortgaged are liens from the time of their execution, provided they are recorded

within sixty days thereafter. *Bratton's Appeal*, 8 Barr, 164. Where two mortgages upon the same premises are recorded at the same time, and each mortgagee is cognizant of the giving of the other mortgage at the time that he takes his own, the recording acts have no application to the case, in respect to the question of priority. *Jones v. Phelps*, 2 Barb. Ch. 440. If two mortgage deeds are recorded on the same day, and there is nothing else to show that one was received before the other, the mere fact, that one is recorded on an earlier page of the book than the other, furnishes no evidence of priority; and in such case, so far as regards the registry, the rights of the parties are equal; no parol evidence is admissible to show which of the deeds was first received. *Hatch v. Haskins*, 17 Maine, 391. See *Brookfield v. Goodrich*, 32 Ill. 363. Parol evidence is admitted in such a case in Tennessee. *Miller v. Estill*, 1 Meigs, 479. So in Illinois. *Cook v. Hull*, 1 Gilman, 575; see *Lemon v. Staats*, 1 Cowen, 592; *Spaulding v. Scanland*, 6 B. Mon. 353. In Illinois contracts for the sale of land are required by statute to be recorded; and the effect of recording them is the same as in the case of deeds of conveyance. *Doyle v. Teas*, 4 Scam. 202. As to Pennsylvania, see *Brotherton v. Livingston*, 3 Watts & S. 334. A deed not recorded is valid against everybody except creditors and purchasers without notice, who have subsequently derived a title from the grantor. *Odiorne v. Mason*, 9 N. H. 24; *Roe v. Neal, Dudley* (Geo.), 168; *M'Anulty v. Bingham*, 6 How. (Miss.), 382; *Boling v. Ewing*, 9 Dana,

(d) *Scrafton v. Quincey*, 2 Ves. 413. [As to powers of attorney, see note (c¹) above. *Valentine v. Piper*, 22 Pick. 85; *Graves v. Ward*, 2 Duvall (Ky.), 301. As to contracts for the sale of lands in Illinois, *Doyle v. Teas*, 4 Scam. 202; note (c¹) above.]

tered; (e) but an assignment of a legacy charged on land does not require to be registered. (f) Nor does an agreement to assign a leasehold estate as a security for a loan, (g) for the statute does not apply to the case of an equitable mortgage. (h) In a late case, however, the master of the rolls held otherwise, and considered that his own decision was the only authority the other way, and he thought his former decision rested on different grounds; (i) but in the case of *Sumpter v. Cooper*, in 1831, the court of king's bench expressly decided that the statute did not apply to the case of an equitable mortgage. It refers only to the registration of deeds, and where there is merely a lien or equitable mortgage created by the deposit of deeds there is no instrument to be registered. (i¹)

76; *Rolls v. Graham*, 4 Monroe, 120; *Zunts v. Courcelles*, 16 La. An. 96; *Hays v. M'Guire*, 8 Yerger, 92; 4 Kent (11th ed.), 456; *Vance v. M'Nairy*, 3 Yerger, 711; *Shields v. Mitchell*, 10 Yerger, 1; *Morris v. Ford*, 4 Des. 418; *Lawry v. Williams*, 13 Minn. 281; *Stevens v. Morse*, 47 N. H. 532; *Jackson v. Burgott*, 10 John. 462; *Van Rensselaer v. Clark*, 17 Wend. 25; *Dole v. Thurlow*, 12 Met. 162; *Marshall v. Fisk*, 6 Mass. 24; *West v. Randall*, 2 Mason, 181; *M'Caskle v. Amarine*, 12 Ala. 17; *McCament v. Patterson*, 39 Missou. 100; *Gibson v. Chouteau*, 39 Missou. 536; *Irvin v. Smith*, 17 Ohio, 226; *Jackson v. West*, 10 John. 466; *Sicard v. Davis*, 6 Peters (U. S.), 124; *French v. Gray*, 2 Conn. 92; *Palmer v. Paine*, 9 Gray, 56; *Wolcott v. Winchester*, 15 Gray, 467; so also is an unrecorded attachment in Massachusetts, *Coffin v. Ray*, 1 Met. 212. An unrecorded deed is good in Massachusetts against the devisees of the grantor, *Flynt v. Arnold*, 2 Met. 622; 4 Kent (11th ed.), 622; *Wolcott v. Winchester*, 15 Gray, 467; so in Kentucky, *Hancock v. Beverly*, 6 B. Mon. 531. In Ohio a mortgage has no effect, either in law or equity, previous to its delivery for record. *Holliday v. Franklin Bank*, 16 Ohio, 533. It has been supposed to be the rule in Massachusetts that no deed of lands can be admitted as evidence in the

trial of a cause unless it has previously been recorded. *Shaw C. J.* in *Palmer v. Paine*, 9 Gray, 56; *Wolcott v. Winchester*, 15 Gray, 467. But the contrary has been held in Pennsylvania. *Keichline v. Keichline*, 54 Penn. St. 75. A certificate of acknowledgment is presumed to be correct. *Dresel v. Jordan*, 104 Mass. 417.]

(e) *Honeycomb v. Waldron*, 2 Stra. 1064. [See *Clark v. Jenkins*, 5 Pick. 280. In Massachusetts, leases for less than seven years need not be recorded. In New York, all leases over three years must be recorded. 4 Kent (11th ed.), 456, 458, 459.]

(f) *Malcolm v. Charlesworth*, 1 Ke. 63; *In re Jennings' Estate*, 8 Ir. Ch. Rep. 421.

(g) *Wright v. Stansfeld*, 5 Jur. N. S. 5.

(h) *Sumpter v. Cooper*, 2 B. & Ad. 223.

(i) *Moore v. Culverhouse*, 25 Beav. 639.

(i¹) [As to the necessity for recording assignments of mortgages, see *Ipswich Manuf. Co. v. Cogswell*, 5 Met. 310, 316; 1 Cruise Dig. by Mr. Greenleaf, vol. 2, tit. 15, ch. 5, § 1, in note; *Clark v. Jenkins*, 5 Pick. 280; *Wolcott v. Winchester*, 15 Gray, 461; *Welch v. Priest*, 8 Allen, 165; *James v. Johnson*, 6 John. Ch. 417; *N. Y. Life Ins. & Trust Co. v. Smith*, 2 Barb. Ch. 82; *Mott v. Clark*, 9 Barr, 399. In *James v. Johnson*, 6 John. Ch. 417, it was held that the registry of the

4. Upon the *Irish act* (j) it has been held that a deed by a woman before her marriage must be registered, in order to exclude a registered conveyance by her husband after the marriage of his estate in * his marital right.(k) And it has also been held that if A. grant to B., who does not register, and then to C., *who does not register*, and then C. grants to D., who does register, B.'s prior deed, though unregistered, shall prevail against the subsequent grant to D., though registered,(l) because A., after the grant to B., had nothing left to grant except by a *registered* deed executed by himself. And an assignment under an insolvency in England must be registered in Ireland as to estates there.(m)

5. Upon the head of notice it has been decided, 1. That a person having the legal estate as a mortgagee, and advancing more money without notice of a second mortgage duly registered, shall hold against the second mortgagee until he is satisfied all the money; (n) 2. That the registry is not notice, and therefore

assignment of a mortgage is not notice to a mortgagor, so as to render payments by him to the mortgagee in his own wrong; but it is effectual notice to a subsequent purchaser or mortgagee. It is necessary, for the protection of an assignee of a mortgage, that the assignment should be recorded. *Clark v. Jenkins*, 5 Pick. 280; see *Vanderkemp v. Shelton*, 11 Paige, 28.]

(j) 6 An. c. 2; 13 & 14 Vict. c. 72; 2 & 3 W. 4, c. 87; *In re Jennings' Estate*, *ubi sup.*

(k) *Warburton v. Loveland*, 2 Dow & Cl. 480. [A widow is not entitled to dower in lands which her husband had conveyed before marriage, although the deed was not recorded at the time of the marriage. *Blood v. Blood*, 23 Pick. 80.]

(l) *Jack v. Armstrong*, 1 Hud. & Bro. 727; *Fury v. Smith*, *Id.* 735; *Mill v. Hill*, 3 H. L. Cas. 828.

(m) *Battersby v. Rochfort*, 2 J. & L. 431.

(n) *Bedford v. Backhouse*, 2 Eq. Ca. Ab. 615; *Wrightson v. Hudson*, *Id.* 609. [See *Berry v. Mutual Ins. Co.* 2 John. Ch. 603; *Johnson v. Stagg*, 2 John. 510; *Evans v. Jones*, 1 Yeates, 174; *Jarvis v. Rogers*, 15 Mass. 389, 397. A ques-

tion sometimes arises, whether a mortgage may be made effectual to secure future advances; and it is held that a mortgage may be taken and held as a security for future advances and responsibilities to the extent of it, when this is a constituent part of the original agreement; and the future advances will be covered by the lien, in preference to the claim under a junior intervening incumbrance, with notice of the agreement. The principle is, that subsequent advances cannot be tacked to a prior mortgage, to the prejudice of a *bonâ fide* junior incumbrancer; but a mortgage is always good to secure future advances, when there is no intervening equity. 4 Kent (11th ed.), 175. The mortgage deed should disclose the fact that it was intended to cover future advances. The prior mortgagee cannot enlarge his demand beyond what appears on the record or is there indicated with sufficient certainty to put subsequent creditors or purchasers upon inquiry, and to enable them to ascertain, by examination *aliunde*, the extent of the incumbrance; or, from its nature, as in case of a mortgage for indemnity, that there is a prior lien which is incapable of present definite ascertainment.

a purchaser without notice obtaining the legal estate will not be prejudiced by a prior equitable incumbrance registered previously to his purchase.(o) 3. That a purchaser with notice of a prior unregistered incumbrance is bound by it.(p) But of course *notice* of a prior unregistered instrument is unimportant at law. The first registered instrument must prevail at law.(q) A purchaser therefore may in equity be bound by a judgment (r) or a deed, although not registered; but it must be satisfactorily proved that the person who registers the subsequent deed must have known exactly the situations of the persons having the prior deed; and, knowing that, registered in order to defraud them of that title he knew at the time was in them.(s) Apparent fraud,

See *United States v. Hooe*, 3 Cranch, 73; *Conard v. Atlantic Ins. Co.* 1 Peters (U. S.), 448; *Leeds v. Cameron*, 3 Sumner, 488, 492; *Hubbard v. Savage*, 8 Conn. 215, 219; *Pettibone v. Griswold*, 4 Conn. 158; *Stoughton v. Pasco*, 5 Conn. 442; *Crane v. Deming*, 7 Conn. 387, 396; *St. Andrews Church v. Tompkins*, 7 John. Ch. 14; *Garber v. Henry*, 6 Watts, 57; *Lyle v. Ducomb*, 5 Binn. 585; *Brown v. Frost*, 1 Hoff. Ch. 41; *Walling v. Aiken*, 1 McMullan, 1; *Hughes v. Worley*, 1 Bibb, 200; *Livingston v. McInlay*, 16 John. 165; *Hendricks v. Robinson*, 2 John. Ch. 309; *Brinkerhoff v. Marvin*, 5 John. Ch. 326; *James v. Johnson*, 6 John. Ch. 420; *Shirras v. Caig*, 7 Cranch, 34, 50, 51; *Averill v. Guthrie*, 8 Dana, 83; *Badlam v. Tucker*, 1 Pick. 389, 398; *Adams v. Wheeler*, 10 Pick. 199; *Holbrook v. Baker*, 5 Greenl. 309; *Union Bank &c. v. Edwards*, 1 Gill & J. 363; *Claggett v. Salmon*, 5 Gill & J. 314; *Bank of Utica v. Finch*, 3 Barb. Ch. 293. In *Rolt v. Hopkinson*, 3 De G. & J. 177, it was decided that a first mortgage, to secure future advances, had no priority over a second mortgage given for the same purpose, where the advances on the latter were first made, each mortgagee having notice of the other mortgage. See *Craig v. Tappin*, 2 Sandf. Ch. 78; *Robinson v. Williams*, 22 N. Y. 380. In Ohio, it was held that a mortgage to secure future ad-

vances will be postponed to a second recorded mortgage, to the extent of all the advances made after the second mortgage is recorded. *Spader v. Lawler*, 17 Ohio, 371, *Avery J. dissenting*. In New Hampshire, by statute, mortgages to secure future liabilities are invalid, even as between the parties. But this does not render them void, so far as they are made to secure existing debts. *New Hampshire Bank v. Willard*, 10 N. H. 210; *Leeds v. Cameron*, 3 Sumner, 488.]

(o) *Moorecock v. Dickens*, Amb. 678; *Bushell v. Bushell*, 1 Sch. & Lef. 103; *Latouche v. Lord Dunsany*, *Id.* 157. [See *post*, 761, note; but see *Parkist v. Alexander*, 1 John. Ch. 394.]

(p) *Ld. Forbes v. Deniston*, 4 Bro. P. C. 189; 2 Eq. Ca. Ab. 482, pl. 19; 3 Atk. 653; *Chivall v. Nicholls*, Str. 664; *Beatniff v. Smith*, 1 Eq. Ca. Ab. 357, pl. 11; *Blades v. Blades*, *Id.* 358, pl. 12; *Hine v. Dodd*, 2 Atk. 275; *Le Neve v. Le Neve*, 3 Atk. 646; *Sheldon v. Cox*, Amb. 624; *Jolland v. Stainbridge*, 3 Ves. 478; *Cow. 712*; 1 Bur. 474; 1 Sch. & Lef. 102; *Bidulph v. St. John*, 2 Sch. & Lef. 521; *Eyre v. Dolphin*, 2 Bal. & Beat. 290.

(q) *Tunstall v. Trappes*, 3 Sim. 301; *Benham v. Keane*, 1 J. & H. 685; affirmed 31 L. J. N. S. 129.

(r) *Doe v. Allsopp*, 5 B. & Ald. 142.

(s) 3 Ves. 485.

or *clear and undoubted notice*, would be a proper ground of relief; but suspicion of notice, though a strong suspicion, is not sufficient to justify the court in breaking in upon an act of parliament.^(t) *A lis pendens* is not deemed notice for that purpose.^(u)

(t) 2 Atk. 276; *Irons v. Kidwell*, 1 Ves. 69; *Wyatt v. Barwell*, 19 Ves. 435; *Lenahan v. McCabe*, 2 Ir. Eq. R. 342; *Ford v. White*, 16 Beav. 120; *In re Burmester*, 9 Ir. Ch. Rep. 41; *Clarke v. Armstrong*, 10 Ir. Ch. Rep. 263. [See *Buttrick v. Holden*, 13 Met. 355, 357, 358; *Flagg v. Mann*, 2 Sumner, 551; *Lawrence v. Stratton*, 6 Cush. 167, 168; *Neal v. Kerrs*, 4 Geo. 161. In the United States, if a subsequent purchaser has notice, at the time of his purchase, of any prior unregistered conveyance, he shall not be permitted to avail himself of his title, against that prior conveyance. 4 Kent (11th ed.), 169, 170, 456; 1 Story Eq. Jur. § 397. The prior unregistered deed is the same to him as if it had been registered. 4 Kent (11th ed.), 169. This has been long the settled doctrine in courts of equity; and it is often applied in America, although not in England, in courts of law, as a just exposition of the registry acts. 1 Story Eq. Jur. § 397. The ground of the doctrine is, that the taking of a conveyance, after notice of a prior deed, makes a person a *mala fide* purchaser; and not, that he is not a purchaser for a valuable consideration in every other respect; and, therefore, the doctrine is allowed to prevail only where the notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance, in prejudice to the known title of the other party. 1 Story Eq. Jur. §§ 397, 398; 4 Kent (11th ed.), 169, 170; *Connecticut v. Bradish*, 14 Mass. 296; *Ross v. Hole*, 27 Ill. 104; *Jackson v. Leek*, 19 Wend. 339; *Adams v. Cuddy*, 13 Pick. 464; *McMechan v. Griffing*, 3 Pick. 149; *Shaw v. Poor*, 6 Pick. 87; *Spofford v. Weston*, 29 Maine, 140; *French v. Gray*, 2 Conn. 92; *Dunham v. Day*, 15 John. 554; *Jackson v. Neely*, 10 John. 374; *Berry v. Mut. Ins. Co.* 2 John. Ch. 603; *Jackson v. Sharp*, 9 John. 162, 168; *Jackson v. Burgott*, 10 John. 457; *Dey v. Dunham*, 2 John. Ch. 182; *Jackson v. Page*, 4 Wend. 588; *Van Rensselaer v. Clark*, 17 Wend. 25; *Brackett v. Wait*, 6 Vt. 411; *Corliss v. Corliss*, 8 Vt. 373; *Rogers v. Jones*, 8 N. H. 264; *Porter v. Cole*, 4 Greenl. 20; *Garwood v. Garwood*, 4 Halst. 193; *Stroud v. Lockhart*, 4 Dall. 153; *Edwards v. Brinker*, 9 Dana, 69; *Warnock v. Wightman*, 1 Brevard, 331; *M'Fall v. Sherrard*, Harper, 295; *Doe v. Reed*, 1 Scam. 117; *Sparks v. State Bank*, 7 Blackf. 469; *Ohio Life Ins. Co. v. Ledyard*, 8 Ala. 866; *McRaven v. McGuire*, 9 Sm. & M. 34; *Bush v. Golden*, 17 Conn. 594; *Norcross v. Widgery*, 2 Mass. 500; *Lawrence v. Stratton*, 6 Cush. 163; *Buttrick v. Holden*, 13 Met. 355; *Copeland v. Copeland*, 28 Maine, 525; *Hamilton v. Nutt*, 34 Conn. 501; *Owens v. Miller*, 29 Md. 144. A purchaser of land charged with a trust, of which he had no notice, takes it discharged of the trust. *Brocken v. Miller*, 4 Watts & S. 102; *Lewin Trusts* (5th Eng. ed.), 615, 616, and cases cited; *Perry Trusts*, § 218, and cases cited. An attachment, levy of an execution, and a purchase are, in Massachusetts, on the same footing in reference to the effect of notice of a prior unregistered conveyance. *Priest v. Rice*, 1 Pick. 164; *Farnsworth v. Child*, 4 Mass. 641; *Davis v. Blunt*, 6 Mass. 487; *Brown v. Maine Bank*, 11 Mass. 158; *Coffin v. Ray*, 1 Met. 214, 215; *Flynt v. Arnold*, 2 Met. 622; *Lawrence v. Stratton*, 6 Cush. 167; see, to same effect, *Chamberlain v. Thompson*, 10 Conn. 243; *Bigelow v. Topliff*, 25 Vt. 273; *Bissell v. Nooney*, 33 Conn. 411; *Reichert v. McClure*, 23 Ill. 516. A creditor with notice of an unreg-

(u) 19 Ves. 439; *Wallace v. Ld. Don-egal*, 1 Dru. & Wal. 461. [1 Story Eq. Jur. § 406; *post*, 758, & note.

In a case in Ireland,^(x) where a purchaser under a registered deed had not express notice of an alleged parol contract under

istered deed cannot avoid it. *Dixon v. Doe*, 1 Sm. & M. 70; *Cox v. Milner*, 23 Ill. 476. So a purchaser at a sheriff's sale. *Solms v. McCulloch*, 5 Barr, 473; *Moyer v. Schick*, 3 Barr, 242. In some States, however, creditors are not affected with notice of an unregistered deed. See *Edwards v. Brinker*, 9 Dana, 69; *Lillard v. Ruckers*, 9 Yerger, 64; *Ring v. Gray*, 6 B. Mon. 368; *Guerrant v. Anderson*, 4 Rand. 208; *Washington v. Trousdale*, Mart. & Yerger, 385. And thus they have sometimes been understood to stand in a better position even than a *bonâ fide* purchaser. See *Hart v. Farmers' & Mechanics' Bank*, 33 Vt. 265. But in other States a prior *bonâ fide* conveyance, though unrecorded, has precedence over a subsequent judgment obtained by a creditor of the grantor. *Evans v. McGlasson*, 18 Iowa, 150; see *Greenleaf v. Edes*, 2 Minn. 464; *Bell v. Evans*, 10 Iowa, 353. But now in Vermont, under recent decisions of the court, an attachment of land upon a debt against one holding the record title, creates no equity as against the equitable owner of the estate, even when the creditor had no knowledge of such equity. And the same rule has been extended to an actual levy upon the land. *Hackett v. Callender*, 32 Vt. 97; *Hart v. Farmers' & Mechanics' Bank*, 33 Vt. 252; *Williams v. Fullerton*, 20 Vt. 346; *Poor v. Woodburn*, 25 Vt. 234; *Abell v. Howe*, 43 Vt. 403; see *Stillwell v. McDonald*, 39 Missou. 232. The creditor in such case does not, either by the attachment or levy, take the position of a *bonâ fide* purchaser for value without notice. He takes by his levy only that which belongs to his debtor, but nothing more; and if the debtor has no title, in equity, the creditor obtains none by his attachment and levy. *Hart v. Farmers' & Mechanics' Bank*, 33 Vt. 252; *Abell v. Howe*, 43 Vt. 403; see, also, *Potter v. McDowell*, 43 Missou. 43. The title of an attaching creditor to the land, after-

wards taken by extent, is not affected by any knowledge which the officer may have had of the existence of a prior conveyance of the same land made by the debtor to another person, even though such knowledge may have been communicated to the creditor himself, after the attachment and before the levy. *Stanley v. Perley*, 5 Greenl. 369; see *Coffin v. Ray*, 1 Met. 212, 215; *Stow v. Meserve*, 13 N. H. 46; *Drew v. Kimball*, 43 N. H. 282, 289; *Carter v. Champion*, 8 Conn. 549. The law is otherwise in Vermont. *Hackett v. Callender*, 32 Vt. 97; *Hart v. Farmers' & Mechanics' Bank*, 33 Vt. 252. A purchaser or attaching creditor will not be defeated by the knowledge of an intent on the part of another to obtain a conveyance or to make an attachment, or that a conveyance was actually in a state of being prepared. *Cushing v. Hurd*, 4 Pick. 253; *Warden v. Adams*, 15 Mass. 233; *M'Gregor v. Brown*, 5 Pick. 174; *Brckett v. Waite*, 6 Vt. 411. Notice to a husband, at the time of a conveyance to himself and wife, of a prior unregistered mortgage, is not notice to the wife so as to give the mortgage priority in respect to her title, especially where she pays the consideration for the conveyance out of her separate estate. *Sponable v. Snyder*, 7 Hill (N. Y.), 427. In Massachusetts it is expressly provided by statute that no conveyance of real estate shall be valid and effectual against any person other than the grantor and his heirs and devisees, and persons having *actual notice* thereof, unless it is made by a deed recorded as the statute directs. Gen. Sts. c. 89, s. 3. In the exposition of this clause of the statute, in regard to actual notice, given by Chief Justice Shaw in *Lawrence v. Stratton*, 6 Cush. 163, 166-168, he stated that it was the rule of law prior to the introduction of this clause

(x) *Rice v. O'Connor*, 11 Ir. Ch. Rep. 510.

which the tenant * was in possession, the master of the rolls treated it as clear that the purchaser was not liable to it unless his conveyance bound him, for there was not that "clear and undoubted notice" which is necessary to affect a party claiming under a registered deed. The conveyance was subject to the existing leases and lettings made to the undertenants of the seller, but the court held that an unsigned or parol contract with

into the statute, that if a purchaser or creditor, having actual notice of the prior unrecorded deed, should attempt to acquire title to the estate by purchase or attachment, it would be a fraud upon the holder of such prior deed, to attempt to defeat it, by setting up his junior recorded deed; which the law would not allow, and so such notice was held to be an exception to the statute. See *Norcross v. Widgery*, 2 Mass. 506, by Parsons C. J.; *Dudley v. Sumner*, 5 Mass. 438, by Sewall J. "This rule," he says, "was uniformly adopted and acted upon, and put upon the ground that a party with such notice could not take a deed without fraud; the objection was not to the nature of the conveyance, but to the honesty of the taker." "The court are of opinion that this clause was thus introduced into the text for more general and explicit information; not to change the law, but to declare it as it previously existed; and intended to accomplish the same object." "The actual notice contemplated by the statute must be notice of some conveyance, on which the party knows or believes that a prior grantee relies, and under which he claims." 6 Cush. 167, 168; see *Curtis v. Mundy*, 3 Met. 405; *Parker v. Osgood*, 3 Allen, 490; *George v. Kent*, 7 Allen, 18; *Pomroy v. Stevens*, 11 Met. 244. It is not sufficient to prove facts that would reasonably put the subsequent purchaser or attaching creditor on inquiry. He is not bound to inquire; but the party relying upon an unregistered deed against a subsequent purchaser or attaching creditor must prove that the latter had actual notice or knowledge of such deed. The burden of proof is on him who alleges such notice. *Pom-*

roy v. Stevens, 11 Met. 244, 247, 248; *Richardson v. Smith*, 11 Allen, 134; *Sibley v. Leffingwell*, 8 Allen, 584; *Butler v. Stevens*, 26 Maine, 484, 489; *Spofford v. Weston*, 29 Maine, 140. In *Curtis v. Mundy*, 3 Met. 405, it was held that this notice need not be a certain and positive knowledge of the existence of the prior deed, or such knowledge as would be acquired by seeing the deed or being told thereof by the grantor. See *George v. Kent*, 7 Allen, 18. The notice is sufficient if it be such as men ordinarily act upon in the ordinary affairs of life. *Curtis v. Mundy*, *supra*. Intelligible information of a fact either verbally or in writing, and coming from a source which a party ought to give heed to, is generally considered as notice of it, except in cases where particular forms are necessary. *Chapman J.* in *George v. Kent*, 7 Allen, 18; see *Perrin v. Reed*, 35 Vt. 2. Actual notice in such case is required also by statute in Maine, Rev. St. Maine, 1841, c. 91, s. 26. For the construction given to it, see *Spofford v. Weston*, 29 Maine, 140; *Butler v. Stevens*, 26 Maine, 484; *Hanly v. Morse*, 32 Maine, 287; *Clark v. Bosworth*, 51 Maine, 528; *Beal v. Gordon*, 55 Maine, 482. Where the declarations of the subsequent purchaser, relied upon to prove notice, indicate his disbelief that any prior deed has been given by his grantor, although admitting his knowledge of a claim that such deed existed by those who professed to hold under it, there can arise no presumption that he had actual notice of the existence of such a deed. *Spofford v. Weston*, 29 Maine, 140; see 1 Story, Eq. Jur. § 398; *Buttrick v. Holden*, 13 Met. 357.]

part performance was not "an existing lease or letting" within the meaning of the deed. If a settlement be executed before marriage, but not then registered, and after the marriage the party claiming under it have notice of a prior unregistered incumbrance, yet he may obtain priority by registering the settlement before the prior incumbrance is registered.(y) A judgment creditor is bound by notice of a prior unregistered mortgage, for the act only makes the unregistered deed void as against subsequent purchasers and mortgagees, and the judgment operated only on what the debtor had, and therefore did not defeat in equity the interest of the unregistered mortgagee.(z) And a registered mortgage where the mortgagee has notice of a prior unregistered judgment is bound by the judgment, for no person having notice can *by contract* put himself in a position better than that of the person with whom he contracts; and where a man has created a charge affecting his estate he is not at liberty to enter into any new contract in derogation of the interest which he has created. But between judgment creditors, the rule is otherwise, for the first *registered* judgment under the registry acts prevails over a prior unregistered judgment, although the registered creditor had notice of the prior judgment, for a judgment creditor is not a purchaser in such a sense as to render it impossible for a subsequent judgment creditor to acquire a charge by reason merely of there being nothing left which the debtor would have power to charge; and, as we have seen, the judgment act has not repealed the registry act, but the two statutes are to be read together, and the construction of the two acts read together is, that a judgment is not a charge upon land in a registry county until it is registered there.(a)

6. Under the Irish act, however, equitable estates created for valuable consideration by a registered instrument, bind a purchaser even without notice as equitable estates, and he would be compelled to give effect to them.(b)

(y) *Elsey v. Lutyens*, 8 Hare, 159.

(b) *Bushell v. Bushell*, 1 Sch. & Lef. 90;

(z) *Lee v. Green*, 2 Jur. N. S. 170; *Thompson v. Simpson*, 1 Dru. & War. Benham v. Keane, 1 J. & H. 685, *per* 459, 485; *Mill v. Hill*, 12 Ir. Eq. R. 107; *Cur.* affirmed 31 L. J. N. S. 129. 3 H. L. Cas. 828; see *Ford v. White*, 16

(a) *Benham v. Keane*, *ubi sup.*; *qu.* Beav. 120.
where the unregistered judgment is in effect a contract. S. C.

* 7. The acts require the memorial, the body of which may be lithographed, (c) *to be under the hand and seal of some or one of the grantors or grantees, his or their heirs, executors, or administrators, guardians, or trustees, attested by two witnesses, *one whereof to be one of the witnesses to the execution of the deed*, and he is to prove on oath both the execution of the memorial and of the deed itself. (d) Where the witnesses are dead or absent, a reëxecution in the presence of a new witness, for the purpose of registry, would be inoperative. (e) If a representative require the registration he need not reëxecute the deed, it will be sufficient to execute the memorial *only* in the presence of two witnesses, "one whereof to be one of the witnesses to the execution of such deed or conveyance," which witness will then, according to the very words of the act, prove the signing and sealing of the memorial, and the execution of the deed or conveyance mentioned in such memorial. (1) A corporation affixing their seal is tantamount to a *signing* and sealing by an individual. (f) The registration of certificates of writs of execution, (g) decrees or orders from the courts of equity, or rules of the courts of law, (h) office copies of wills, (i) and certificates of the discharge of judgments, (k) is wholly nugatory, so far as any priority or effect is attempted to be given to them by force of the act. (k¹)

(c) *The Queen v. Reg. of Middlesex*, 7 Q. B. 156.

(d) In the Act for the North Riding of York, the words "one whereof to be one of the witnesses," is omitted by mistake.

(e) *Essex v. Baugh*, 1 Yo. & Col. C. C. 620; *Jack v. Armstrong*, 1 Hud. & Bro. 727; *Hobhouse v. Hamilton*, 1 Sch. & Lef. 207.

(f) *Doe v. Hogg*, 1 New R. 306. [See *Brinley v. Mann*, 2 Cùsh. 337; 4 Kent (11th ed.), 451; *Stinchfield v. Little*, 1 Greenl. (2d ed.) 231, 238, note (a); *Savings Bank v. Davis*, 8 Conn. 191; *Milldam Foundry v. Hovey*, 21 Pick. 417; *Warner v. Mower*, 4 Vt. 385; *Jackson v. Walsh*, 3 John. 228; *Hatch v. Barr*, 1 Ham. (Ohio) 394; *Angell & Ames Corp.*

(9th ed.) §§ 217, 218, 224–227; *Sheehan v. Davis*, 17 Ohio St. 571.]

(g) *Rigge*, Prec. 35, p. 148; see 1 Hud. & Bro. 760.

(h) *Rigge*, 83, n. (h).

(i) *Rigge*, 96, n. (s).

(k) *Rigge*, Prec. 87, n.

(k¹) [*Villard v. Robert*, 1 Strobb. Eq. 393; *Commonwealth v. Rodes*, 6 B. Mon. 171; *Thomas v. Grand Gulf Bank*, 9 Sm. & M. 201; *Pitcher v. Barrows*, 17 Pick. 361; 1 Story Eq. Jur. § 404. Where a registered deed conveys real and personal estate, the registry is not of itself constructive notice of the transfer of the personal estate; transfers of personal estate not being required to be registered. *Pitcher v. Barrows*, 17 Pick. 361. And a recital

(1) As to the persons who answer the description required to entitle them to execute the memorial, see 8 Geo. 1, c. 15, Ir.; *Murphy v. Leader*, 1 Jeb. & Bour. 66.

8. In regard to the contents of the memorial — the anxiety of the legislature not wantonly to compel the disclosure of the concerns of individuals, induced them simply to require that every memorial should contain, first, the day of the month and year when the deed, &c., bears date, and the names and additions of all the parties to it,^(l) and of the devisor or testatrix of a will, and of all the witnesses to such deed, &c., and the places of their abode; and, secondly, the honors, manors, lands, tenements, and hereditaments contained in such deed, &c., and the names of the parishes, &c., where any such estates lie that are comprised in or affected by such deed, &c., in such manner as the same are expressed or mentioned in such deed, &c., or to the same effect.^(m) It seems, however, advisable to go a step farther, and to state to whom the estate is conveyed, as this, where there are more than two parties, will facilitate a search for incumbrances * on the estate; but no good reason can be given why the parties should be put to expense by stating the instrument more fully. When a purchaser discovers what deeds were executed, he will of course require the production of them; and so no mischief can arise by a strict adherence to the letter of the act.

9. With respect to the parcels it is provided, that where there are more writings than one for making or perfecting any conveyance or security which concerns the same estates, it shall be a sufficient memorial thereof, if all the estates are only once named in the memorial of *any one* of the deeds or writings, and the dates of the rest of the deeds or writings, with the names and additions of the parties and witnesses, and the places of their abodes, are only set down in the memorials of the same, with a reference to the deed or writing whereof the memorial is so registered, that contains the parcels mentioned in all the deeds, and directions how to find the registering of the same.⁽ⁿ⁾ This provision has been extended in practice. It is usual, for instance, in a memorial of an assignment of a lease, to refer for the parcels to the prior registry of the lease, although a separate and

in a deed recorded cannot affect the purchaser with notice respecting any other land than that which is conveyed by it. *Boggs v. Varner*, 6 Watts & S. 469.]

(l) *Harding v. Carry*, 10 Ir. C. L. Rep. 140.

(m) 7 An. c. 20, s. 6; as to Ireland, see *Delacour v. Freeman*, 2 Ir. Ch. R. 633.

(n) 7 An. c. 20, s. 7.

distinct transaction. This, however, is very incorrect.⁽¹⁾ The statute only authorizes such a reference where several writings are executed to perfect the *same* conveyance or security. And where the memorial does not comply with the directions of the act, the person claiming under the deed defectively registered cannot insist on the benefit of the statute against a subsequent purchaser without notice, whose conveyance is duly registered.

10. Where a proposed memorial of an assignment of a lease (which lease was not registered) described the house as it was described in the lease, and then added "by the description of the premises in the within written lease," the memorial was rejected, for the description in it was not contained in the assignment to be registered, which described the premises only by reference to the lease, and there was no statement in the memorial showing from whence the description was obtained. In the case of a second deed indorsed on a former deed, and importing by reference the description of the premises from the former deed, the court thought that the particulars of the description according to the truth should be given, and that this would not be done unless the dates and parties to both deeds were specified, together with the description from both deeds.^(o)

11. In regard to the exceptions in the acts. The first exception is of copyhold estates.* This exception is general; and it may be thought that no deed relating to a copyhold estate need be registered; * but it is advisable to register such leases of copyhold estates as would require registry if the estate were freehold. The next exception is of leases at rack-rent. It frequently happens that a lease originally at rack-rent becomes of some value in the course of a few years, but perhaps the better opinion is, that a lease originally at rack-rent, and within the exception in the acts, continues so during the term, although it may become a valuable and saleable interest. The next exception is of leases not exceeding twenty-one years, where the actual

^(o) The Queen v. Reg. of Middlesex, 15 Q. B. 976.

(1) See now a new form, 15 Q. B. 978, which the judges in that case approved of.

possession and occupation go along with the lease. Where such a lease is assigned, by way of mortgage, it is always usual in practice to require it to be registered, and the acts seem cautiously worded, so as not to exempt the lease in that event. But an assignment of the lease out and out for a valuable consideration cannot take it out of the exception. It still remains within, as well the spirit as the words of the exception. While the possession and occupation go along with the lease no one can be deceived, and the lease still continues "a lease not exceeding twenty-one years, where the possession and occupation go along with the lease."(*p*) The last exception requiring notice is of the chambers in Serjeant's Inn, which is within the city; and it has therefore been doubted, whether the legislature did not intend the act of 7 Anne to include in its operation the whole metropolis, except the borough of Southwark.(*q*) But there is not the least ground for this doubt. It is not surprising that the mistake should have been made, and it is impossible to argue, that such an error shall make an act passed relating to lands "in the county of Middlesex," upon the petition of the "justices of the peace and grand jury of the county of Middlesex," extend to the city of London. This construction would invalidate some thousands of leases, as the general opinion of the profession is, that the act does not extend to the city.

12. We have already seen (*r*) that the registries of Middlesex and York will cease to be applicable to any land in those counties respectively as soon as the same have been put upon the register under the indefeasible title and registry act, *and whilst it remains thereon*.

13. There are still two other provisions as to registry. The 46th section of the 1 & 2 Vict. c. 110, although repealed, may yet operate on some titles; it made a copy of any order under the act vesting the estate of any prisoner in the provisional assignee, evidence of such order and appointment respectively having been made, and of the title of the provisional assignee, and

(*p*) *Fury v. Smith*, 1 Hud. & Bro. 735; (*r*) *Sup. ch. 12*, s. 5; 25 & 26 Vict. c. 6 An. c. 2, s. 14, Ireland. 53, s. 104.

(*q*) *Rigge*, 88, n. (*p*).

of such other * assignee or assignees respectively, under the same, provided that where any conveyance of property of an insolvent debtor would be required to be registered in any registry office, then such copy as therein is described of such order, and a like copy of the appointment of an assignee or assignees under the act, should be registered in the proper registry office; and the registry should have the like effect as the registry of such conveyance would have had; and the title of any purchaser of any such property as last aforesaid for valuable consideration, without notice of any such order or appointment as aforesaid, who should have duly registered his purchase deed previously to the registry thereby directed, should not be invalidated by reason of such order as aforesaid, or the appointment of an assignee or assignees as aforesaid, or the vesting of such property in him or them consequent thereupon respectively, unless a copy of such orders, and a copy of such appointment, if any, should be registered in Great Britain and Ireland, within two months after the date of such order and appointment respectively.(1) And, as we have seen, certificates of appointments of assignees are required to be registered in England or Ireland, where by law any conveyance or assignment of any property of a petitioner would require to be registered.(s)

SECTION V.

OF PROTECTION FROM DEFECTS IN RECOVERIES, AND FROM DEFECTS IN SALES FOR LAND TAX, AND OF PURCHASES BY ROMAN CATHOLICS.

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| 1. Purchaser protected against defect of record or of recovery deed.
2. Provisions in 3 & 4 Will. 4, c. 74, in favor of purchasers.
3. Defective sales for land tax rendered valid. | 4. Power to commissioners for taxes to confirm sales for land tax.
5. Extent of power.
6. Purchaser with notice.
7. Sale of school buildings.
8. Purchases by Roman Catholics. |
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1. THE 14 Geo. 2, ch. 20, s. 4, contained some provisions in favor of purchasers, where no record could be found of a re-

(s) 1 & 2 Vict. c. 110, s. 8, *sup.* ch. 13, pl. 7; see *Gardiner v. Blessinton*, 1 Ir. Ch. 1, 12 & 13 Vict. c. 106, s. 143; *sup.* s. 3, R. 64.

(1) 3 & 4 W. 4, c. 74, s. 74, as to enrolment of deeds under that statute, and *supra*.

covery, or the same should appear not to be regularly entered of record, or where the deed making the tenant to the *præcipe* should be lost or not appear,(a) but they have now little operation.

2. The act of 3 & 4 W. 4, c. 74, which abolished fines and recoveries, * contains several provisions in favor of purchasers, in order where a voidable estate is in a purchaser for value under a tenant in tail, to make any subsequent assurance under the act, as far as may be, operate as a confirmation of his title,(b) even where the subsequent assurance is under the bankrupt acts ; (c) provided in both cases that if the disposition by such assurance should be made to a purchaser for value, who has not express notice of the voidable estate, the voidable estate shall not be confirmed against such purchaser. But it is provided (d) that in cases of dispositions under the act by tenants in tail, and also in cases of consent by protectors of settlements, the jurisdiction of equity shall be altogether excluded, either on the behalf of a person claiming for a valuable or meritorious consideration or not, in regard to the specific performance of contracts and the supplying of defects in the execution either of the powers of disposition given by the act to tenants in tail, or of the powers of consent given by the act to protectors of settlements, and the supplying under any circumstances of the want of execution of such powers of disposition and consent respectively.

3. The 12th section of the 54 Geo. 3, c. 173, gives validity to sales under the land tax redemption acts, although made by persons not strictly authorized to sell without some further assurance, or by reason that all the lands of such persons did not stand settled to the same uses, or by reason that a greater quantity was sold than necessary, or by reason of some other mistake or inadvertence ; provided the sales were *bonâ fide* and for valuable consideration, and appear to have been made with the consent of the commissioners,(1) but this was not to exclude

(a) 11th edit. Purch. 1000.

(b) S. 38.

(c) S. 62 ; 12 & 13 Vict. c. 106 ; *sup.* s.

3, and c. 12, s. 2.

(d) S. 47, which has a further provision ; *sup.* ch. 12, s. 2.

(1) C. 116. This act makes the decision of the commissioners conclusive as to the adequacy of the price, and it enables them to dispose of so much of the property as

equitable relief by way of annual rentcharge.(e) This clause has been held to extend to a mistake in paying the price of the timber on the estate to the tenant for life who was without impeachment of waste, instead of paying it into the bank with the rest of the purchase money.(f)(1)

* 4. The 57 Geo. 3, c. 100, s. 22, gives power to the commissioners for taxes to confirm sales for the redemption of land tax, where the deeds of sale have not been executed by the commissioners for the redemption of land tax. And section 24 gives validity to deeds not enrolled in time, provided they were enrolled within a time limited, and if not, authorizes the commissioners for redemption to order the same to be enrolled, and if so enrolled renders them valid. And after reciting that for some purposes for which hereditaments were authorized to be sold by the acts, some sales of estates had been made, the title to which, as derived under such sales, might be considered liable to objections, it was enacted,(g) that all sales made, and all conveyances executed, of hereditaments sold for redeeming land tax, provided such conveyances should appear to have been executed with the consent of the respective commissioners, were thereby confirmed.

5. It has been decided that this clause applies to defects in the title of the purchaser by reason of some non-compliance with the former act, and therefore would have aided the defect already noticed, if the 54 Geo. 3, c. 173, s. 12, had not.(h) And the acts remove any objection to the party selling having been both

(e) *Beaden v. King*, 9 Hare, 499.

499; s. 26 has a limited saving for disabilities.

(f) *Doe v. Philips*, 1 Q. B. 4 Per. & Da. 562.

(h) *Doe v. Philips*, 1 Q. B. 84.

(g) S. 25; *Beaden v. King*, 9 Hare,

they shall deem sufficient for the purposes of the act. The meaning of that is, that the approbation of the commissioners, together with the conveyance by the tenant for life, shall be a good title unless impeached by fraud; *Doe v. Woodward*, 1 Ex. 277, per Parke, B.

(1) As to merger of land tax, see *Bulkeley v. Hope*, 1 K. & J. 482; 16 & 17 Vict. c. 117, s. 2, which merged all land tax redeemed after the act, without making proper exceptions and regulations; but this act has been repealed by the 19 & 20 Vict. c. 80, s. 3. As to the terms, &c., of redemption, see s. 1 of the act 16 & 17 Vict. c. 74. A purchaser of a fee-farm rent from the crown must allow a deduction of 4s. in the pound to the landowner who has redeemed the land tax; *Moody v. Dean and Chap. of Wells*, 1 H. & N. 40.

seller and purchaser.⁽ⁱ⁾ But a purchaser will not obtain a title under the land tax redemption act unless his money be actually paid into the bank. In *Hicks v. Morant*,^(k) where the money was paid to the common solicitors of the owner and the purchaser, and was not invested, the purchaser was denied relief against the owner, the sale having been made during his infancy, notwithstanding acquiescence and a security taken by the owner, long after he attained twenty-one, from the attorney for the purchase money, but the owner offered to give to the purchaser the benefit of the security so taken. This, however, was a case of considerable difficulty. But in every case, where a sale is liable to be impeached, it should of course be seen whether the sale is not capable of support under the acts to which reference has been made. A purchase by fraud is not protected.^(l)

6. Although land tax has been redeemed, yet if a purchaser buy with notice that a person is entitled to an equitable charge in respect of it, he will of course be bound to make good the charge.^(m)

7. The 18 & 19 Vict. c. 131, prohibits the sale, exchange, or mortgage of school buildings and land in aid of which public money had been or should be granted by the privy council committee on education, without the consent of the home secretary or the repayment of the * money advanced; but it is provided that the act shall not affect any purchaser for valuable consideration without notice.

8. When Roman Catholics were in effect disabled from purchasing for their own benefit, certain provisions were made by the legislature to protect purchasers from them; but these acts are now unimportant, as the relief bill⁽ⁿ⁾ enacted that no oath should be required to be taken by Roman Catholics for enabling them to hold and enjoy any real and personal property other than such as may be required to be taken by his majesty's other subjects.

(i) See the grounds, *Beaden v. King*, 9 Hare, 499.

(k) 3 Yo. & Jer. 286; 5 Bligh N. S. 648; 2 Dow & Cl. 414; Sugd. H. of L. 677; *Laurie v. Laurie*, 2 Dow, 556.

(l) *Beaden v. King*, 9 Hare, 499.

(m) *Ware v. Ld. Egmont*, 4 De G., M. & G. 460, L. C. held the purchaser had not constructive notice, *infra*.

(n) 10 Geo. 4, c. 7, s. 23, and annual bills of indemnity.

CHAPTER XXIII.

OF EQUITABLE RELIEF AND PROTECTION.

SECTION I.

OF EQUITABLE RELIEF AND PROTECTION WHERE THE PURCHASER HAS NO NOTICE.

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| <p>2. Purchaser protected, although equitable title a forged instrument.</p> <p>3. May avail himself of satisfied charges. — Where he has the best right to call for legal estate.</p> <p>4. First mortgagee with notice conveying to third.</p> <p>5. Priorities according to time in equities.</p> <p>6. Lease and release: no estoppel.</p> <p>7. Assignee of purchase money cannot tack.</p> <p>8. No protection from estate in a trustee upon an express trust.</p> <p>9. Fraud in others, or accident, no ground of relief against purchaser: no discovery of writings.</p> <p>10. Trustee refusing to act against a purchaser. — Dormant incumbrances relieved against.</p> <p>11. So defective execution of power. — But not a power by will where estate sold.</p> <p>12. Production of deed with evidence on its face of fraud, enforced.</p> <p>13. Mistake, &c., of conveying parties no prejudice to purchaser.</p> <p>14. Unless objection not fairly stated. — If a general statement, party is bound.</p> <p>16. All rights of conveying parties pass.</p> <p>17. Party with right encouraging another to buy binds his right. — So where the representation is by mistake.</p> <p>18. So where an incumbrance is denied: liability of trustees.</p> | <p>19. Incumbrancer not bound to give notice to purchaser.</p> <p>20. Vendor, his heirs and assignees, to make good defective conveyance. — So judgment creditors.</p> <p>21. Even a subsequent title bound. — Whether this is a personal equity.</p> <p>22. Conveyance by wrong person.</p> <p>23. Contingent remainder conveyed to a purchaser and destroyed, seller's subsequent title is to make it good.</p> <p>24. Equity between trustees of renewable leaseholds and purchaser.</p> <p>25. No relief against solemnities under act of parliament.</p> <p>26. Equal equities: contribution by several purchasers to judgment debts.</p> <p>27. Purchaser of part relieved against concealed incumbrance, by the other part.</p> <p>28. <i>Barnes v. Raester</i>.</p> <p>* 29. Purchase set aside: allowance for improvements.</p> <p>30. Unless fraud.</p> <p>31. No remedy if evicted at law.</p> <p>32. Prior incumbrancer purchasing lets in puisne ones.</p> <p>33. Mortgagee buying after agreement for lease bound by it.</p> <p>34. How prior incumbrances should be kept on foot, on purchase.</p> <p>35. Bill to perpetuate testimony upon claims to a reversion.</p> |
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1. A COURT of equity acts upon the conscience, and as it is impossible to attach any demand upon the conscience of a man

who has purchased for a valuable consideration *bonâ fide*, and without notice of any claim on the estate, such a man is entitled to the peculiar favor and protection of the court.^(a1)

2. Where the seller's equitable title depended upon a forged will, which of course was produced, the purchaser was held to be entitled to the protection of the court; for the protection of the legal estate which he had obtained from a satisfied mortgagee, is to be extended not merely to cases in which the title of the purchaser for valuable consideration without notice is impeachable, by reason of a secret act done, but also to cases in which it is impeached by reason of the falsehood of a fact of title asserted by the vendor, or those under whom he claims, where such asserted title is clothed with possession, and the falsehood of the fact asserted could not have been detected by reasonable diligence.^(a) But where railway debentures granted to three trustees were deposited with one, and he forged the names of the other two to a transfer by the three to a purchaser for value without notice, which was accepted and acted upon by the railway company, the purchaser was compelled to give up his security to the trustees whose names had been forged, for they had not paid the money to the three trustees or their agent, and they assumed, without inquiring, that they had executed the deed: it would have been different if the transaction had been with a person in possession, having an apparent title in himself.^(b) And where a devisee sold to a purchaser, neither of them being aware that the will had been revoked by a later one under which the seller was also a devisee, but subject to certain trusts, it was held that the interest of the seller under the true will passed to the purchaser; it was decided that this case did not fall within the principle of *Jones v. Powles*, for the purchaser's only title was under the second will, and that contained on the face of it trusts which he was bound to perform.^(c)

(a1) [See *Frost v. Beekman*, 1 John. Ch. 298; 1 Dan. Ch. Pr. (4th Am. ed.) 569, & note (7); 1 Story Eq. Jur. § 410; 2 *Ib.* § 1503; *Wood v. Mann*, 1 Sumner, 507; *McNeil v. Magee*, 5 Mason, 269; *Vattier v. Hinde*, 7 Peters (U. S.), 252; *Fitzsimmons v. Ogden*, 7 Cranch, 2; *Boone v. Chiles*, 10 Peters (U. S.), 177; *Howell v. Ashmore*, 1 Stockt. (N. J.) 82.]

(a) *Jones v. Powles*, 3 My. & Ke. 581; 1 J. & L. 264.

(b) *Cottam v. East. Count. Rail. Co.* 1 J. & H. 243; see *Ex parte Swan*, 30 L. J. N. S. 113, C. P.

(c) *Carter v. Carter*, 3 K. & J. 617.

Yet he had not notice of the second will, and although no doubt his legal title was under the second will, yet he obtained it by a conveyance of the seller's supposed interest under the first will.

*3. And it is a general rule, that a purchaser *bonâ fide*, and for a valuable consideration, without notice of any defect in his title *at the time he made his purchase*, may buy or get in any incumbrance (although it is satisfied); and if he can defend himself at law by it his adversary shall never be aided in equity for setting it aside; for equity will not disarm a purchaser, but assist him, and precedents of this nature are very ancient and numerous, viz., where the court hath refused to give any assistance against a purchaser, either to an heir, or to a vendor, or to the fatherless, or to creditors, or even to one purchaser against another.(d) And this extends to a purchaser where he has a better right to call for the legal estate than any other person;(e) nor will he be compelled in equity if he obtain possession of deeds *bonâ fide*, and without notice to deliver them up, although he cannot maintain his title to the estate.(f) And the rule in favor of purchasers applies to personal as well as to real estate.(g) Where a trustee of separate funds under separate settlements misapplied the funds of one, and upon a bill filed, transferred into court the funds of the other to make good the misappropriation, the *cestuis que trust* of the latter settlement were held not to be entitled to the fund in court, for there was no notice, and the transaction amounted to an alienation.(h) The case of *Joyce v.*

- (d) *Basset v. Nosworthy*, Finch, 102; *Jerrard v. Saunders*, 2 Ves. jr. 454; *Anon.* 2 Ch. C. 208; *Hitchcock v. Sedgwick*, 2 Ver. 156; *Goleborn v. Alcock*, 2 Sim. 552; [*Boone v. Chiles*, 10 Peters (U. S.), 177, 210, 211; *Perry Trusts*, § 218; *Watson v. Le Roy*, 6 Barb. 485; *Varick v. Briggs*, 6 Paige, 325; *Demarest v. Wynkoop*, 3 John. Ch. 147; *Mundine v. Pitts*, 14 Ala. 84; *Tompkins v. Powell*, 6 Leigh, 576; *Woodruff v. Cook*, 1 Gill & J. 270; *High v. Batte*, 10 Yerger, 335; *Blight v. Banks*, 6 Monroe, 198; *Goodtitle v. Cummings*, 8 Blackf. 179; *Mott v. Clark*, 9 Barr, 399; *Rutgers v. Kingsland*, 3 Halst. Ch. 178, 658; *Holmes v. Stout*, 3 Green Ch. 492.]
- (e) 2 Ver. 600; *Willoughby v. Willoughby*, 1 T. R. 763; *Blake v. Hungerford*, Pre. C. 158; *Charlton v. Low*, 3 P. Wms. 328; *Ex parte Knott*, 11 Ves. 609; *Shine v. Gough*, 1 Bal. & Beat. 436; *Bowen v. Evans*, 1 J. & L. 264; *Parker v. Carter*, 4 Hare, 400; *Hartley v. O'Flaherty*, Beat. 80, 81; 3 Sim. 300; see *Corry v. Cremorne*, 12 Ir. Ch. Rep. 136. [See *Williamson v. Gordon*, 5 Munf. 257.]
- (f) *Joyce v. De Moleyns*, 2 J. & L. 374.
- (g) *Dawson v. Prince*, 2 De G. & J. 41.
- (h) *Thorndike v. Hunt*, 3 De G. & J. 563; *Case v. James*, 29 Beav. 512.

De Moleyns has been questioned, but it has not been overruled as regards the statements in the text,⁽ⁱ⁾ and has been followed in several cases.

4. Where there was a first mortgagee with the legal estate, a second equitable mortgagee who had given notice to the first, and then a transfer of the first mortgage to a third person, who advanced a further sum to the mortgagor upon the transfer, and had no notice of the second mortgage, and afterwards advanced further sums without notice; the mortgagee of the legal estate without notice was allowed to hold for all the money advanced against the equitable mortgagee; a purchaser without notice being safe, although the seller to him had notice.^(i¹) This was the case of *Peacock v. Burt*,^(j) in * which a slip of Lord Eldon's on this subject was corrected.^(k) And the right to tack exists as well in a foreclosure as in a redemption suit.^(l) An equitable mortgagee with further advances which gave him the right

(i) *Fraser v. Jones*, 5 Hare, 475, 12 Jur. 443, on app.; *Stackhouse v. Lady Jersey*, 1 J. & H. 721.

(i¹) [See 1 Story Eq. Jur. § 412 *et seq.*; 4 Kent (11th ed.), 176-179. In the United States the system of tacking is never allowed as against mesne incumbrances, which are duly registered. "The doctrine of tacking," says Mr. Chancellor Kent, "is founded on the assumption of a principle which is not true in point of fact; for as between A., whose deed is honestly acquired and recorded to-day, and B., whose deed is equally honestly acquired and recorded to-morrow, the equities upon the estate are not equal. He who has been fairly prior in point of time has the better equity, for he is prior in point of right." "And," he adds, "I presume the English law of tacking is with us very generally exploded." 4 Kent (11th ed.), 178, 179; 1 Story Eq. Jur. § 419, in note; *ante*, 196, note; *Watts v. Symes*, 1 De G., M. & G. (Am. ed.) 240, note (2); *Grant v. United States Bank*, 1 Caines Cas. Er. 112; *Frost v. Beekman*, 1 John. Ch. 298, 299; *Parkist v. Alexander*, 1 John. Ch. 398, 399; *St. Andrews Church v. Tompkins*, 7 John. Ch. 14; 1

Cruise Dig. by Mr. Greenleaf, vol. 2, tit. 15, ch. 3, § 36, note, § 55, note; *Dorow v. Kelly*, 1 Dallas, 142; *Cleaveland v. Clark*, Brayt. 166; *Bridgen v. Carhartt*, 1 Hopkins, 234. In most of the United States, also, the statutes providing for the redemption of mortgaged estates expressly give this right of redemption, on payment or tender of the amount due upon the mortgage. See *Loring v. Cooke*, 3 Pick. 48, 50; *Green v. Tanner*, 8 Met. 411; *Chase v. McDonald*, 7 Harr. & J. 160; *Lee v. Stone*, 5 Gill & J. 1; *Ogle v. Ship*, 1 A. K. Marsh. 287; *Scripture v. Johnson*, 3 Conn. 211.]

(j) *Peacock v. Burt*, Coote Mortg. 693; *Brace v. Duchess of Marlborough*, 2 P. Wms. 491; *Belchier v. Butler*, Renforth v. Ironside, 1 Ed. 523; *Belchier v. Renforth*, 5 Bro. P. C. by T. 29; *Robinson v. Davison*, 1 Bro. C. C. 63; *Ex parte Knott*, 11 Ves. 619; *Barnett v. Weston*, 12 Ves. 134, 135; *Spencer v. Pearson*, 24 Beav. 266; *Bates v. Johnson*, Johns. 304; *Prosser v. Rice*, 28 Beav. 68.

(k) 15 Ves. 335; 11th edit. Purch. 1016.

(l) *Selby v. Pomfret*, 1 J. & H. 336.

to call for the legal estate, which he subsequently obtained, but not before a registered judgment was entered up against the mortgagor, was held to have priority over the judgment creditor, as well for the advances made subsequently to the judgment *bonâ fide*, and without notice as for those made before it.^(m) But a mortgagee for an existing debt covering future advances cannot, after notice of a later similar mortgage to another, claim priority over the latter in respect of any advance by him as first mortgagee subsequently to such notice.⁽ⁿ⁾

5. Where the legal estate was in a trustee, and he joined with the *cestuis que trust* in a mortgage deed to A., by which the *cestuis que trust* assigned their interest, and the trustee covenanted to stand possessed of the legal estate accordingly, and the *cestuis que trust* alone (1) then mortgaged to B., subject to the mortgage to A., and then they alone made a third mortgage to the *representatives* of A., in whom the first was vested — the several mortgagees were held to be entitled to priorities according to their dates, although B. did not give notice to A. of the second mortgage, and A.'s representatives had not notice of it. The covenant by the trustee in the first mortgage was held not to vary the rights under the second and third mortgage.^(o)

6. Where a man having an *equitable* estate under a contract, conveyed it by lease and release to a mortgagee in fee, reciting that he was legally or equitably entitled to it, and afterwards obtained a conveyance of the legal fee to himself, and mortgaged it to another person who had no notice, it was held that there was no estoppel to prevent the mortgagee of the legal fee from maintaining his title against the mortgagee of the equitable fee.^{(p)(2)}

(m) *Cooke v. Wilton*, 29 Beav. 100.

(n) *Rolt v. Hopkinson*, 25 Beav. 461, 3 De G. & J. 177, affirmed in D. P. 7 Jur. N. S. 1209, *nom.* *Hopkinson v. Rolt*, where the proceedings in *Gordon v. Graham* are fully stated from the registrar's book; *Hipkins v. Amery*, 2 Giff. 292; *Cook v. Wilton*, 29 Beav. 100. [But see *ante*, 728, note.]

(o) *Frere v. Moore*, 8 Pri. 475, where some of the dates are incorrectly stated, but by comparing the statement of the case with the judgment, the errors may be readily corrected.

(p) This is a legal point, *Right v. Bucknell*, 2 B. & Ad. 278. [See *ante*, 556, n. (7).]

(1) The trustee was a party to the deed, but it appears by the judgment that he did not execute it.

(2) *Leach v. C.* in *Bensley v. Burdon*, 2 Sim. & Stu. 519, held that a conveyance

* 7. An assignee of the purchase money cannot by getting in a first mortgage tack so as to affect the rights of the purchaser to have the estate cleared of incumbrances.(q)

8. A purchaser cannot protect himself by taking a conveyance or assignment of a legal estate from a trustee in whom it was vested upon express trusts.(r) In a late case,(s) the question was much considered whether a purchaser without notice of a previous incumbrance can protect himself, by obtaining from a trustee an outstanding legal estate, where the trustee himself had notice of the intervening incumbrance. The learned judge said that he had not been able to find any case of that description. He spoke of cases where it is a dry trust. Not the case of a mortgagee whose mortgage is unsatisfied, but the dry trust of a satisfied mortgage, or a satisfied term of years attending on the inheritance, where there is nothing but the trust remaining to be performed. But we may observe that there is no decision that a purchaser cannot protect himself in such a case, which probably is owing to the supposed opinion of the profession, that notice in the trustee would not affect the purchaser who bought without notice. In a later case the master of the rolls observed, that if the legal estate be in the hands of a person who

(q) *Lacy v. Ingle*, 2 Phil. 413.

(r) *Saunders v. Dehew*, 2 Ver. 271 ; 2 Free. 123 ; *Allen v. Knight*, 5 Hare, 272 ; 11 Jur. 527 ; *Carter v. Carter*, 3 K. & J. 641 ; [*Sharples v. Adams*, 32 Beav. 213 ; *Collier v. McBean*, 34 Beav. 426 ; *Justice v. Wynere*, 10 Irish Ch. 489 ; 12 Irish Ch. 289 ; *Lewin Trusts* (5th Eng. ed.), 616, 617 ; *Perry Trusts*, § 218. The purchaser in such case would be held to be subject to

the original trust in the same manner as the trustee. 1 Story Eq. Jur. § 395 ; *Murray v. Ballou*, 1 John. Ch. 566. But a purchaser of A., a trustee, is not chargeable with notice of the trust by means of the registry of a deed from H. to B. reciting that A. had executed a declaration of the trust. *Murray v. Ballou*, 1 John. Ch. 566.]

(s) *Carter v. Carter*, 3 K. & J. 639.

was an estoppel, upon the general ground that it was a deed indented, and that the nature of the conveyance, namely, lease and release, made no difference. This was corrected in *Right v. Bucknell*, upon the authority of *Littleton*. *Bensley v. Burdon* was affirmed solely because there was an allegation of a particular fact, viz., that the grantor was entitled to the interest granted, whereas in the case in the king's bench there was no such precise averment, but a recital only that the grantor was legally or equitably entitled, 2 B. & Ad. 282, 8 L. J. Ch. 85. How far the recitals in a release of this nature will operate to pass the estate by estoppel, requires further consideration. Lord Lyndhurst, in his judgment, does not seem to have distinguished between lease and release and other deeds ; the case was not finally disposed of. This point was considered in *Crofts v. Middleton*, 2 K. & J. 194, 8 De G., M. & G. 192.

has no pecuniary interest, and who is therefore a bare trustee *with duties to perform*, the getting in of the legal estate does not alter the intention of the parties, which remains as it was before, and the fact of obtaining the legal estate under such circumstances does not give the person obtaining it the advantage of being able to tack his security to the legal estate. *If it were otherwise, a trustee who had the legal estate might put it up for sale and sell it to the highest bidder.* He thought the intention of the parties in such a case was not altered, and he concurred with V. C. Wood in *Carter v. Carter*, that they remained in the same situation. The case put by the learned judge was that of a trustee with duties to perform, and of course no conveyance from him contrary to such duties could be supported; but the case to be considered is that of a naked trustee, whose estate might be obtained by any of several incumbrancers, and one uses diligence and obtains a conveyance from him, he being a purchaser * who obtained a conveyance and paid his money without notice of any prior incumbrance. A decision in his favor certainly would not justify the trustee in selling the estate by auction for his own benefit.(t)

9. The court of chancery will not supersede a commission, now an adjudication, of bankruptcy even for fraud, where there have been purchasers under it; (u) for a commission being superseded, all falls with it.(x) So equity will not relieve against a *bonâ fide* purchaser without notice, although the remedy be gone by accident,(y) nor will it compel him to discover any writings which may weaken his title; (z) or take any advantage from him by which he may protect himself at law, or obtain terms of his antagonist; (a) neither will equity give any person an advantage over (b) a purchaser, or any assistance against him; (c) and his having taken a collateral security for the title will not make

(t) *Prosser v. Rice*, 28 Beav. 68.

(u) *Ex parte Edwards*, 10 Ves. 104; *Ex parte Leman*, 13 Ves. 271; *Ex parte Rawson*, 1 Ves. & Bea. 160; *Ex parte Lautour*, 1 Mon. & Bli. 89.

(x) 1 Ves. & Bea. 66.

(y) *Harvy v. Woodhouse*, Sel. C. C. 80; *Bell v. Cundall*, Amb. 101; [1 Story Eq. Jur. § 108.]

(z) *Bp. of Worcester v. Parker*, 2 Ver.

255; *Hall v. Adkinson*, 2 Ver. 463; 1 Eq. Ca. Ab. 333, pl. 54; *Millard's case*, 2 Free. 43; *Sir J. Burlace v. Cook*, 2 Free. 24; *Jerrard v. Saunders*, 2 Ves. jr. 454; *Hunt v. Elmes*, 27 Beav. 62, 28 Beav. 631, 2 De G., F. & J. 578.

(a) *Walwynn v. Lee*, 9 Ves. 24.

(b) *Bechinall v. Arnold*, 1 Ver. 354.

(c) *Graham v. Graham*, 1 Ves. 262.

his case worse,(d) unless the purchase by the vendor was fraudulent, in which case it would have considerable weight with a court of equity.(e) But some of the early cases would not now be followed.(f)

10. If a man purchase for valuable consideration, without notice from a disseisor, and the disseisee is a trustee for another, although the general rule is, that a trustee is bound to convey, upon request, to his *cestui que trust*, yet if in this case the trustee refuse to convey the legal estate to the *cestui que trust*, or to suffer the latter to bring an ejectment in his (the trustee's) name, a court of equity will not compel the trustee to do so, because it would in effect be granting relief against a purchaser.(g) This case strongly marks the favor shown to a *bonâ fide* purchaser. And a *bonâ fide* purchaser without notice will be relieved against incumbrances which have lain dormant for a long time.(h)

* 11. So equity will relieve a purchaser for valuable consideration against a defective execution of a power, in the same manner as against a defective surrender of copyholds.(i) But if a devisee, having an estate for life, with a power to dispose of the inheritance by *will*, sell the estate in his lifetime, equity cannot relieve the purchaser, although by the effect of accident he has got the legal estate in fee simple; for, in a case like this, the testator cannot be understood to mean that the devisee should so execute the power.(k)

12. If the purchaser's deed have circumstances on the back of it which tend to show that the execution of it was obtained by fraud, the purchaser will be compelled to produce the deed itself.(l)

(d) *Lowther v. Carleton*, For. 187; but see *White v. Stringer*, 2 Lev. 105; *Jennings v. Selleck*, 1 Ver. 467.

(e) *How v. Weldon*, 2 Ves. 516, see 2 Free. 123; *Siddon v. Charnells*, Bun. 298; *Fagg's case*, 1 Ver. 52, 1 Ch. C. 68, *nom.* *Sherly v. Fagg*, where the circumstance of theft does not appear; *Harcourt v. Knowel*, 2 Ver. 159; see 3 K. & J. 637; *Ogilvie v. Jeaffreson*, 2 Giff. 353.

(f) *Culpepper's case*, 2 Free. 124.

(g) *Turner v. Back*, 22 Vin. p. 21, pl. 5, where the *cestui que trust* claimed under a voluntary settlement.

(h) *Burgh v. Wolf*, Tot. 226; *Smith v. Rosewell*, *Ib.* 224, 247; *Abdy v. Loveday*, Finch, 250; *Sibson v. Fletcher*, 1 Ch. R. 32; *Ld. Dillon v. Costelloe*, 2 Mol. 512; *Wallace v. Ld. Donegal*, 1 Dru. & Wal. 461. [See *Reigal v. Wood*, 1 John. Ch. 402.]

(i) *Chapman v. Gibson*, 3 Bro. C. C. 229; *Sugd. Pow.* 8th edit. 545. [See *Roberts v. Stanton*, 2 Munf. 129.]

(k) *Per Lord Eldon*; *Reid v. Shergold*, 10 Ves. 370; [4 Kent (11th ed.), 319; 1 Story Eq. Jur. § 173; 2 *Ib.* § 1393.]

(l) *Kennedy v. Green*, 6 Sim. 6; [2

13. The mistake or ignorance of any of the parties to a conveyance of their rights in the estate will not turn to the prejudice of a *bonâ fide* purchaser for a valuable consideration.^(m) And where a man, being already married, performed the marriage ceremony with another, and then joined with her as his wife in assigning her property to a purchaser — although she was deceived — the assignment to the purchaser was supported.⁽ⁿ⁾ And where contracting parties act without fraud on a *bonâ fide* apprehension of their interests, although it is discovered afterwards that these interests are differently modified, the purchaser cannot be affected.^(o) Although a party obtain a release of a security by fraud, yet if the property be conveyed by him in pursuance of a covenant to a mortgagee or purchaser who was ignorant of the fraud, the title of the latter cannot be impeached in equity.^(p)

14. If upon a purchase, any person is required to join to obviate an objection to the title, and the objection is stated in such a manner as not to convey full information, the purchaser cannot avail himself of the instrument against the person executing it; but if a person having only a general statement that there are objections to a title which his concurrence will obviate, upon that communication conveys, he is bound.^(q)

Dan. Ch. Pr. (4th Am. ed.) 1830. It is the practice of courts of equity to order deeds and papers, contested as false and fraudulent, to be brought into court for inspection. *Apthorpe v. Comstock*, 1 Hopkins, 143; S. C. 8 Cowen, 386.]

(m) *Malden v. Menill*, 2 Atk. 8; [1 Story Eq. Jur. §§ 108, 139, 165; *Storrs v. Barker*, 6 John. Ch. 166.]

(n) *Sturge v. Starr*, 2 My. & Ke. 195.

(o) *Marshall v. Collett*, 1 Yo. & Col. 238. [It is a maxim of equity that parties making a mistake in matters of fact shall not be bound by acts committed by them under such mistake. 1 Story Eq. Jur. § 140 *et seq.*; Fonbl. Eq. bk. 1, ch. 2, § 7, n. (v); *Leger v. Bonaffe*, 2 Barb. Ch. 475; *Irick v. Fulton*, 3 Grattan, 193; *Smith v. Mackin*, 4 Lansing (N. Y.), 41. When, however, they make a mistake in law, they cannot afterwards be heard to say that the contract shall on that account

be set aside. 1 Story Eq. Jur. § 111 *et seq.*; *Hunt v. Rousmanier*, 8 Wheat. 174; S. C. 1 Peters (U. S.), 1; S. C. 2 Mason, 342; S. C. 3 Mason, 294; Fonbl. Eq. bk. 1, ch. 2, § 7, note (v); *Storrs v. Barker*, 6 John. Ch. 166, 169, 170; *Shotwell v. Murray*, 1 John Ch. 512; *Lyon v. Richmond*, 2 John. Ch. 51, 60; *United States v. Daniel*, 12 Peters (U. S.), 32, 55, 56; *Hall v. Reed*, 2 Barb. Ch. 500; *Juzan v. Toulmin*, 9 Ala. 662; *Bebee v. Swartwout*, 3 Gilman, 162; *Sparks v. White*, 7 Humph. 86; *Gist v. Gist*, 1 Bailey Eq. 343; *Heilbron v. Bissell*, 1 Bailey Eq. 430; *Fellows v. Heermans*, 4 Lansing (N. Y.), 230, 241 *et seq.*]

(p) *In re Burmester*, 11 Ir. Ch. Rep. 1.

(q) *Ld. Braybroke v. Inskip*, 8 Ves. 417; 3 Swan. 73; *Malcolm v. Charlesworth*, 1 Ke. 63; *Addis v. Campbell*, 4 Beav. 401.

15. And even where a party joining without consideration in a release to facilitate a sale may be entitled in equity still to retain his security on the property as against the owner, yet he may be bound as against purchasers.(*r*)

* 16. Where parties join in a conveyance to a purchaser, all their rights ought to be considered as transferred to him, unless any of them are expressly reserved. It is much too dangerous to speculate upon intentions not declared, with a view to confine the operation of the deed and to cut down the interest for which the purchaser contracted. This was lost sight of in a case in the House of Lords, which was deemed so dangerous a precedent that it was in contemplation to introduce a bill to reverse the decision.(*s*) Unascertained and undefined advantages will pass by the general words of the grant of a manor, although not in the contemplation of either party at the time. Minerals in the lord's waste would pass, although the existence of them was not known or suspected by any of the parties; so also an advowson appendant to a manor will pass under the general words accompanying a grant of the manor.(*t*)

(*r*) *Hatchell v. Cremorne*, 1 Rep. *t*. Plunk. 236, *qu.* and consider the case; *Stronge v. Hawkes*, 4 De G., M. & G. 186.

(*s*) *Fausset v. Carpenter*, 2 Dow & Cl. 232; Sugd. H. of L. 76; see *Evans v. Jones*, 1 Kay, 29; *Carter v. Carter*, 3 K. & J. 634; *qu.* the opinion expressed on the conveyance of 1854, p. 649, which it was not necessary to act upon.

(*t*) *Atty. Gen. v. Ewelme Hospital*, 17 Beav. 385, 386, *per Cur.* [See *Hicks v. Sallitt*, 3 De G., M. & G. 782; *Hicks v. Hastings*, 3 K. & J. 701. And it may here be remarked, that upon the conveyance of part of an estate, a grant of all such rights and easements over the residue retained by the vendor as are essential to the due enjoyment of the part conveyed, will, if there be nothing in the conveyance to regulate the presumption, be presumed at law; for instance, the grant of an absolutely necessary right of way, *Pinnington v. Galland*, 9 Exch. 1; *Pearson v. Spencer*, 7 Jur. N. S. 1195; 1 B. & S. 571; 3 B. & S. 761; or of drainage, *Pyer v. Car-*

ter, 1 H. & N. 916; *Ewart v. Cochrane*, 4 Macq. 117; 7 Jur. N. S. 925; or of the right to the continued enjoyment of modern light on the sale of a house, or of the right to that extraordinary support by the adjoining soil which is requisite in order to support the buildings as the part conveyed. See *Smart v. Morton*, 25 L. T. 97; 5 El. & Bl. 30; *Dugdale v. Robertson*, 3 K. & J. 695; *Caledonian R. Co. v. Sprot*, 2 Macq. 449; *Roberts v. Haines*, 2 Jur. N. S. 999; 6 El. & Bl. 643; 7 El. & Bl. 625; and, conversely, in the absence of anything in the conveyance to negative the presumption, the law will presume a reservation in the conveyance of all such rights and easements over the part conveyed as are essential to the due enjoyment of the part retained by the vendor. See *Pinnington v. Galland*, 9 Exch. 1; *Pearson v. Spencer*, 9 Jur. N. S. 1195; 1 B. & S. 571; 3 B. & S. 761; *Worthington v. Gimson*, 6 Jur. N. S. 1053; 29 L. J. Q. B. 113; *Davies v. Sear*, L. R. 7 Eq. 427. But in order to pass rights which

17. If a person having a right to an estate permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right,^(u) although covert,^(x) or under

are not properly servitudes, the word "appurtenances" is insufficient; words amounting to an express grant must be used; *Barlow v. Rhodes*, 1 Cr. & M. 439; *Baird v. Fortune*, 7 Jur. N. S. 926; and recent cases seem to show that, except as regards an easement of necessity, it is only an easement which had an existence prior to the two tenements becoming united in the same owner, which, on the disposition of one them, will be considered as arising by implied grant or reservation. See, and consider, judgment of Lord Westbury in *Suffield v. Brown*, 3 N. R. 340; 33 L. J. Ch. 249; 1 Dart V. & P. (4th Eng. ed.) 493 *et seq.*; and *ante*, 56, note (c¹), where many cases are collected.]

(u) *Hobs v. Norton*, 2 Ch. C. 128; *Hanning v. Ferrers*, 2 Eq. C. Ab. 356, pl. 20; 1 Free. 310; 16 Ves. 253; *Govett v. Richmond*, 7 Sim. 1; *Nicholson v. Hooper*, 4 My. & Cr. 185, 186; *Sandys v. Hodgson*, 10 Ad. & El. 472, a dog cause; *Stevens v. Stevens*, 2 Col. 20; *Leader v. Ahearne*, 4 Dru. & War. 495; *Boyd v. Belton*, 1 J. & L. 730; *Thompson v. Simpson*, 2 J. & L. 110; *Crofts v. Middleton*, 2 K. & J. 194; 8 De G., M. & G. 192; *Hutton v. Rossiter*, 7 De G., M. & G. 9. [A person, who being himself the owner of property, or having an interest in or claim upon it, stands by and sees another sell it, as his own, without objection, will not be allowed afterwards to assert his title. His silence, when, in good conscience he ought to speak, shall close his mouth when he would speak. *Chautauque County Bank v. White*, 6 Barb. 589, 604; *Marshall v. Pierce*, 12 N. H. 127, 133; *Thompson v. Sanborn*, 11 N. H. 201, 206; *Morse v. Child*, 6 N. H. 521; *Marston v. Brackett*, 9 N. H. 336, 351; *Watkins v. Peck*, 13 N. H. 360; *Parker v. Brown*, 15 N. H. 184, 185; 1 Story Eq. Jur. § 385; *Storrs v. Barker*, 6 John. Ch. 166; *Wendell v. Van Rensselaer*, 1 John. Ch. 354; *Brincker-*

hoff v. Lansing, 4 John. Ch. 65; *Brothers v. Porter*, 6 B. Mon. 106; *Davis v. Tingle*, 8 B. Mon. 539; *Shapley v. Rangeley*, 1 Wood. & M. 213, 217; *Hatch v. Kimball*, 16 Maine, 146; *Brig Sarah Ann*, 2 Sumner, 206, 211, 212; *Evans v. Bicknell*, 6 Ves. (Sumner's ed.) 174, note (c); *Heard v. Hall*, 16 Pick. 457, 459, 460; *Fay v. Valentine*, 12 Pick. 40; *Gray v. Bartlett*, 20 Pick. 186, 193; *Parsons C. J. in Foster v. Briggs*, 3 Mass. 313, 316; *Platt v. Squire*, 12 Met. 494; *Audendried v. Betteley*, 5 Allen, 384; *Plumer v. Lord*, 9 Allen, 455; *Langdon v. Doud*, 10 Allen, 437; *Andrews v. Lyons*, 11 Allen, 349; *Turner v. Coffin*, 12 Allen, 401; *Fall River National Bank v. Buffington*, 97 Mass. 498; *Hutton v. Rossiter*, 7 De G., M. & G. (Am. ed.) 9, note; *Casey v. Inloes*, 1 Gill, 430; *Irwin v. Morell*, *Dudley* (Geo.), 72; *Skinner v. Stouse*, 4 Missou. 93; *Henderson v. Overton*, 2 Yerger, 394; *Brown v. Wheeler*, 17 Conn. 345; *Thayer v. Bacon*, 3 Allen, 165; *Mahoney v. Horan*, 53 Barb. 29; *Cornelius v. Burford*, 28 Texas, 202; *Foster v. Bigelow*, 24 Iowa, 379; *Copeland v. Copeland*, 28 Maine, 525; *Maple v. Kussart*, 53 Penn. St. 348; *Ridgway v. Morrison*, 28 Ind. 201; *Meason v. Kaine*, 67 Penn. St. 126; *Miller v. Miller*, 60 Penn. St. 16. In *Marshall v. Pierce*, 12 N. H. 127, 133, Mr. Justice Gilchrist said: "This principle has been extended beyond the case of a fraudulent concealment of title, and applied to the case of one who was actually ignorant of his legal rights; who could not, therefore, make known his title at the time of the purchase, but who still has been postponed in equity to a *bonâ fide* purchaser. A very strong case of this character is *Hobbs v. Nor-*

(x) *Savage v. Foster*, 9 Mod. 35; *Evans v. Bicknell*, 6 Ves. 174; *Draper v. Borlace*, 2 Vern. 369; *Barrow v. Barrow*, 4 K. & J. 409.

age.(y) And even at law, as to chattels, a party who negligently or culpably stands by and allows another to contract on the un-

ton, 1 Vern. 136, of which Mr. Chancellor Kent says, in *Storrs v. Barker*, 6 John. Ch. 166, 172, 173, 'it was confirmed in subsequent cases, and it has never been overruled or questioned.' " See *Broome v. Beers*, 6 Conn. 212-214. But it has been held in several cases in Massachusetts that in order to create an estoppel *in pais*, the acts or declarations relied upon must have been accompanied by a design to induce the party who sets up the estoppel to act upon them. *Andrews v. Lyons*, 11 Allen, 349; *Plumer v. Lord*, 9 Allen, 455; *Bragg v. Boston & Worcester Railroad Corp.* 9 Allen, 62; *Turner v. Coffin*, 12 Allen, 401; *Langdon v. Doud*, 10 Allen, 433; *Coggill v. Hartford & New Haven Railroad*, 3 Gray, 549; *Osgood v. Nichols*, 5 Gray, 420; *Page v. Wight*, 14 Allen, 182, 184; see *Copeland v. Copeland*, 28 Maine, 525; *Howard v. Hudson*, 2 El. & Bl. 10; *Pickard v. Sears*, 6 Ad. & El. 469; *Freeman v. Cooke*, 2 Exch. 663; *Garlinghouse v. Whitwell*, 51 Barb. 208; *Maple v. Kussart*, 53 Penn. St. 348; *May v. Hanks*, Phill. (N. C.) Eq. 310. This point was a good deal discussed in *Drew v. Kimball*, 43 N. H. 282, where the authorities upon the subject, which are conflicting, were cited and commented upon. And it was held, that it is not necessary that the acts and declarations forming the basis of the estoppel should have been designed to induce the particular person setting up the estoppel to act upon them; but that it is sufficient, if such acts and declarations were intended to induce, or were calculated to induce all persons who might have occasion to act upon them to believe them true and to act accordingly. See *Freeman v. Cooke*, 2 Exch. 663; *Howard v. Hudson*, 2 El. & Bl. 10; *Dalzell v. Odell*, 3 Hill, 219; *Welland Canal Co. v. Hathaway*, 8 Wend. 483; *Copeland v. Copeland*, 28 Maine, 528; *Hicks v. Cram*, 17 Vt. 448-455; *Wooley v. Chamberlain*, 24 Vt. 270-276; *Spiller v. Scribner*, 36

Vt. 245; *Halloran v. Whitcomb*, 43 Vt. 306, 312; *Rangely v. Spring*, 21 Maine, 130; 1 Greenl. Ev. § 207; *Brookman v. Metcalf*, 4 Rob. (N. Y.) 568; *Kinney v. Farnsworth*, 17 Conn. 355; *Whitaker v. Williams*, 20 Conn. 98. As to the extent to which a party claiming the benefit of the estoppel must have been injured, or must have changed his position in consequence of the conduct relied upon as the basis of the estoppel, see *Drew v. Kimball*, 43 N. H. 282, 288, 289, & cases cited; *Turner v. Waldo*, 40 Vt. 51. The question has been raised, whether the rule stated in the text prevails at law; and Mr. Justice Wilde, in *Heard v. Hall*, 16 Pick. 460, referring to this doctrine, said: "Although this rule has been long established as a rule of equity, it does not appear to have been adopted or considered as a rule at common law, except in the State of Pennsylvania, where the courts, having no equity jurisdiction, have introduced into their system of jurisprudence many rules and principles of equity in furtherance of justice, and to supply the supposed defects of the common law." See *Heard v. Cushing*, 7 Pick. 169; *Whitaker v. Sumner*, 7 Pick. 551; *Saunders v. Robinson*, 7 Met. 310, 315; *Parker v. Barker*, 2 Met. 423. The rule was applied at law in *Hatch v. Kimball*, 16 Maine, 146, in reference to real estate; and in *Copeland v. Copeland*, 28 Maine, 525. So in *Runlet v. Otis*, 2 N. H. 167; and in *Marshall v. Pierce*, 12 N. H. 134; Mr. Justice Gilchrist said: "As the cases now stand in this State, *Runlet v. Otis* is an authority for the position, that the rule in equity has been adopted here at law in relation to conveyances of land." See per Green J. in *Morse v. Child*, 6 N. H. 521.]

(y) *Watts v. Cresswell*, 9 Vin. 415; 9 Mod. 38, 96, 97; 4 Bro. C. C. 507, n.; *Clare v. Earl of Bedford*, 13 Vin. 536; 3 Ch. C. 85, 123; *Cory v. Gerteken*, 2 Mad. 46; *Overton v. Banister*, 3 Hare, 503;

derstanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving.(z) Where an incumbrancer stood by at a treaty for the settlement of the incumbered estate on the marriage of the owner's son, without opposition, and fraudulently concealed his charge, and privately assured the father of the son that he would trust to his personal security, he was compelled to relinquish his charge as against the son and his wife, and the issue of the marriage.(a) And the same rule prevails even where the representation is made * through a mistake, if the person making it might have had notice of his right.(b)(1) But if parties cannot agree upon terms, a proposed purchaser cannot go and build upon the land, and then, upon the allegation of the owner standing by, demand the land at its value before it was built upon.(c)

18. So when a person inquires of another whether he has any

Stokeman v. Dawson, 1 De G. & Sm. 90; 59; but observe the circumstances of that case; [Storrs v. Barker, 6 John. Ch. 166; Vaughan v. Vanderstegen, 2 Drew. 363; Copeland v. Copeland, 28 Maine, 525; see Unity Joint Stock &c. Assoc. v. King, 3 De G. & J. 63; Wright v. Leonard, 8 Jur. N. S. 415. [See Bright v. Boyd, 1 Story, 478; Davis v. Tingle, 8 B. Mon. 539; Hall v. Timmons, 2 Rich. Eq. 120; Norris v. Wait, 2 Rich. 148.]

(z) Gregg v. Wells, 10 Ad. & El. 90; Gerhard v. Bates, 2 Q. B. 476; Holroyd v. Marshall, 2 De G., F. & J. 596, as to the right of execution creditor to chattels against equitable assignees.

(a) Berrisford v. Milward, 2 Atk. 49. [See Bragg v. Boston & Worcester Railroad Corp. 9 Allen, 54, 61; Drew v. Kimball, 43 N. H. 282; Moore v. Bowman, 47 N. H. 494; Pickard v. Sears, 6 Ad. & El. 474; Thompson v. Sanborn, 11 N. H. 201; Dewey v. Field, 4 Met. 381; Bird v. Benton, 2 Dev. 179; Governor v. Freeman, 4 Dev. 472.]

(b) Pearson v. Morgan, 2 Bro. C. C. 388*; Teasdale v. Teasdale, Sel. C. C.

59; but observe the circumstances of that case; [Storrs v. Barker, 6 John. Ch. 166; Copeland v. Copeland, 28 Maine, 525; see Odlin v. Gove, 41 N. H. 465; Broome v. Beers, 6 Conn. 212, 213, 214. On the other hand, a party setting up an equitable estoppel, *in pais*, is himself bound to the exercise of good faith and due diligence to ascertain the truth. Moore v. Bowman, 47 N. H. 494; Odlin v. Gove, 41 N. H. 465. And it has accordingly been held that a prior mortgagee of real estate who stands by and sees a third party take a second mortgage on the same estate without objection, will not be postponed thereby, if his mortgage was duly registered. See Odlin v. Gove, 41 N. H. 477; Moore v. Bowman, 47 N. H. 499; Brinckerhoff v. Lansing, 4 John. Ch. 65; Bigelow v. Topliff, 25 Vt. 273; Carter v. Champion, 8 Conn. 554; Clabaugh v. Byerly, 7 Cal. 354.]

(c) Meynell v. Surtees, 25 L. N. S. 266; 3 Sm. & Gif. 101, quoted E. I. Co. v. Vincent, 2 Atk. 83.

(1) *Sed qu.* this as a general rule, unless there be *fraud*? Haycraft v. Creasy, 2 East, 92; Tapp v. Lee, 3 Bos. & Pul. 367; Holmes v. Custance, 12 Ves. 279; Barley v. Walford, 9 Q. B. 197.

incumbrance on the estate, and states his intention to buy it, if the person of whom the inquiry is made deny the fact, equity will relieve the purchaser against the incumbrance.(d) Again, where a purchaser of an equitable right inquires of the trustee of the legal estate whether he knows of any incumbrance, and he answers in the negative, if it turn out that he had notice of any charge, he will be answerable to the purchaser, although he plead forgetfulness in excuse.(e)

19. But a person having an incumbrance upon an estate is not bound to give notice of it to any person whom he knows to be in treaty for the purchase of the estate.(f) Nor, it has been held, is a first mortgagee with a power of sale bound in purchasing the interest of a second mortgagee to communicate to him a previous parol agreement not binding, to sell part of the property to an advantage.(g)

20. If a purchaser take a defective conveyance from the vendor, equity will compel the vendor and his heirs, and all other persons claiming under him by act of law, as assignees of a bankrupt, although without notice, and even persons claiming as purchasers for valuable consideration, if with notice, to make good the conveyance.(h) So a purchaser, by a defective conveyance,

(d) *Boyd v. Belton*, 1 J. & L. 730; [*Mahoney v. Horan*, 53 Barb. 29; *Platt v. Squire*, 12 Met. 494. But, although bound to answer truly, if at all, a mortgagee, it would appear, may decline to answer, unless the intending purchaser offer to redeem him. See *Bugden v. Big-nold*, 2 Y. & Col. C. C. 390. But it has been more recently held, that where property cannot be obtained, without a particular person saying whether he claims it or not, it is not sufficient that he should hold his tongue, but he must state expressly whether he claims or not. *Re Primrose*, 3 Jur. N. S. 899, where the stranger was visited with costs.]

(e) *Burrowes v. Lock*, 10 Ves. 470; *Slim v. Croucher*, 1 De G., F. & J. 518.

(f) *Osborn v. Lea*, 9 Mod. 96; *Ingram v. Thorp*, 7 Hare, 67; [*Burleson v. Burleson*, 28 Texas, 383; *Page v. Arnin*, 29 Texas, 53; *Watkins v. Peck*, 12 N. H. 360, 374; *Keeler v. Vantuyle*, 6 Barr,

350. A mortgagee who has knowledge of a subsequent purchase, and has stood by and seen the purchaser making repairs and improvements without speaking of his mortgage or making objections, is not thereby to be precluded from setting up his mortgage against such purchaser, if it was on record at the time, and there is nothing disclosed to show that the mortgagee knew that the purchaser was in fact ignorant of the mortgage, and was guilty of a fraudulent concealment. *Marston v. Brackett*, 9 N. H. 336. "This," said *Parker C. J.* "is very different from the case of a claim under an absolute title, which would go entirely to defeat the right of the subsequent purchaser." *Ib.* 351. See *Brinckerhoff v. Lansing*, 4 John. Ch. 65; *Odlin v. Gove*, 41 N. H. 477; *Moore v. Bowman*, 47 N. H. 499; note (b) above.]

(g) *Dolman v. Nokes*, 22 Beav. 402.

(h) *Jaques v. Huntley*, 1 Ch. R. 5;

will be relieved against persons who did not consider the land as their original or primary security, *e. g.* judgment creditors; although they may have obtained an advantage at law.⁽ⁱ⁾ And although he who seeks to have equity must do equity, yet where the conveyance was intended to * pass the interest, but is defective for some collateral matter which the seller can make good, he will be compelled to do so, although the purchaser has not performed a covenant for indemnity contained in the conveyance, and the court in that suit will not compel him to perform it; the parties will thus be placed in the same relative position which was intended at the time the conveyance was executed.^(k)

21. And if a man sell an estate to which he has *no title*, and after the conveyance acquire the title, he will be compelled to convey it to the purchaser.^(k¹) But it seems to have been considered that this is a personal equity attaching on the conscience of the party, and not descending with the land; and therefore, that if the vendor do not in his lifetime confirm the title, and the estate descend to the heir at law, he will not be bound by his ancestor's contract.^(l) This opinion, however, deserves great consideration.^(m)

22. A conveyance under a power of sale to a purchaser by a person who was by mistake supposed to be the trustee, has been supported upon acquiescence and the acts of the *cestuis que trust* subsequently to the sale. If the court had set aside the sale, yet it would have assisted the purchaser to recover from the sup-

Taylor v. Wheeler, 2 Ver. 564; Morse v. Faulkner, 1 Ans. 11; 2 Ves. jr. 151; 6 Ves. 745; 11 Ves. 625; Dimes v. Grand J. C. Co. 3 H. L. Cas. 794.

(i) Burgh v. Francis, Finch, 28; Gilb. For. Rom. 223; Averall v. Wade, Llo. & Go. t. Sugd. 252; 15 Ves. 354; Prior v. Penpraze, 4 Price, 99, where the judgment is wrong in saying the creditor had only an equitable, not a legal lien; Hughes v. Williams, 3 Mac. & G. 683; Chappell v. Rees, 1 De G., M. & G. 393. [See Kelly v. Mills, 41 Miss. 267; 2 Story Eq. Jur. § 1503 b; Hart v. Farmers' & Mechanics' Bank, 33 Vt. 252; Abell v. Howe, 43 Vt. 403.]

(k) Gibson v. Goldsmid, 1 Jur. N. S. 1; 5 De G., M. & G. 757, there was a covenant for further assurance.

(k¹) [See ante, 556, note (y); Wark v. Willard, 13 N. H. 389; Bush v. Marshall, 6 How. (U. S.) 284.]

(l) Morse v. Faulkner, 1 Ans. 11; Carleton v. Leighton, 3 Mer. 667; Bensley v. Burdon, 2 Sim. & Stu. 516, upon app. affirmed; Otter v. Ld. Vaux, 2 K. & J. 650, 6 De G., M. & G. 639. [But see, ante, 556, note (y).]

(m) Llo. & Goo. t. Sugd. 260, 261; 1 Dru. & War. 159; Kent v. Stoney, 9 Ir. Ch. Rep. 249.

posed trustee the purchase money still in his hands, or for which he might remain liable,⁽ⁿ⁾

23. Where a man upon a sale conveyed a contingent remainder to the purchaser, which was afterwards destroyed by the tenant for life, who, having acquired the fee, by his will gave the seller other interests in the estates, the seller was compelled to convey those interests to the purchaser.^(o) But this has been since denied by a noble and learned lord in the House of Lords, who said the proposition of the V. C. in Noel and Bewley was true, if the person had agreed to sell and convey his estate *absolutely* in the first instance; then if he had no title at the time of the contract, and had afterwards acquired one, he would be bound to make good his contract; but if he never covenanted absolutely to convey, but only conditionally, and the condition was never fulfilled, he was under no such obligation. [To this proposition there can no objection.] It was clearly a mistaken application on the part of the V. C. of an established rule to a case to which it was not applicable, and in his judgment the case was on that *account wrongly decided, and was of no authority.^(p) It was not, however, necessary to overrule the case.

24. If trustees suffer a tenant for life of a renewable leasehold to enjoy all the profits in breach of a trust to renew out of the rents and profits, the assets of the tenant for life will be applicable in the first instance to their indemnity, and a purchaser from the tenant for life of his life interest will also, it seems, be answerable to the person for whose benefit the renewal ought to have been made. But, as between the trustees and the purchaser, the latter is not primarily answerable. If they permit the tenant for life to apply to his own use all the rents and profits, and abstain from performing the trust, they cannot contend that it was the purchaser's duty to withhold any part of the rents and profits, or the consideration that came in place of them.^(q)

25. Where the conveyance is not perfected with the sole-

(n) Hope v. Liddell, 21 Beav. 183.

(o) Noel v. Bewley, 3 Sim. 103; Jones v. Kearney, 1 Dru. & War. 159; Smith v. Baker, 1 Yo. & Col. C. C. 223; Thompson v. Simpson, 2 J. & L. 110, as to the interest of an assenting party; Osborne v. Smith, 4 Ir. Ch. R. 58.

(p) Per Lord Wensleydale in Smith v. Osborne, 6 H. L. Cas. 397, see p. 392; consider the point.

(q) Ld. Montford v. Ld. Cadogan, 17 Ves. 485; Wallace v. Ld. Donegal, 1 Dru. & Wal. 461; Houlditch v. Ld. Donegal, *Ib.* 503.

nities positively required by an act of parliament, as in the case of the ship registry acts, equity cannot relieve, as it would be against the policy of the acts, unless perhaps there were direct fraud, in which case it would seem that equity would relieve.(r)

26. In a case in Ireland,(s) where Sir A. Hart and Lord Plunket differed in opinion, in the result they appear to have agreed, that where there is a concealed incumbrance, as a judgment, a purchaser of a portion of the estate cannot be compelled to contribute by a later purchaser of another portion. And the rule was considered to apply equally to the case of a mortgage of the whole estate.(t)

27. It has since been decided, that whether there is upon the first sale a mere concealment of the judgment, or, *à fortiori*, if there is a declaration or covenant that the estate is free from incumbrances, the first purchaser is entitled to be relieved against the seller and later judgment creditors claiming under him, so that the estate unsold must bear the whole of the prior judgment debt, as well as its own subsequent incumbrances.(u) But this does not touch the question between several innocent purchasers.

* 28. Where a man having two estates, A. and B., mortgaged A. to one and then A. to another, and then A. and B. to the first mortgagee, for the old and a new debt, and lastly, A. and B. to a stranger; and all three mortgagees had notice of the prior incumbrances from time to time: it was held that the second mortgagee of A. could not throw the first mortgagee upon B. so as to leave A. a clear fund for his second mortgage at the expense of the third mortgagee, and the notice was considered immaterial. But the court left untouched the two questions: first, what would have been the rights of the second and third mort-

(r) *Speldt v. Lechmere*, 13 Ves. 588; *Clarke v. Bodkin*, 13 Ir. Eq. R. 492; *Ex parte Yallop*, 15 Ves. 60; *Ex parte Hancock v. Hancock*, 1 Ir. Ch. R. 444; *In re Jones*, 2 Ir. Ch. R. 544; *Tressilian v. Caniffe*, 4 Ir. Ch. R. 399; *Stronge v. Hawkes*, 4 De G. & J. 632; *Rooke v. Ld. Kensington*, 21 Beav. 470, a right to exoneration provided out of another estate, although no mention made on a mortgage; *Benham v. Keane*, 1 J. & H. 685, *aff'd* 31 L. J. N. S. 129.

(s) *Hartly v. O'Flaherty*, Beat. 61; *Aicken v. Macklin*, 1 Dru. & Wal. 621; *L. & G. t. Plunk*. 208.

(t) *L. & G. t. Plunk*. 216.

(u) *Averall v. Wade*, L. & G. t. Sugd. 252; *Bugden v. Bignold*, 2 Yo. & Col. C. C. 377; *Hughes v. Williams*, 3 Mac. & G. 683; *Chappell v. Rees*, 1 De G., M. & G. 393;

gagees (under the second and fourth mortgages) had the first mortgagee's security upon B. preceded, and not been subsequent to the second mortgagee's security on A.; and secondly, what would have been the rights of the parties had the third mortgagee's security (the fourth mortgage) not existed at all, or not existed until after the commencement of the proceedings in the suit.(x)

29. Where a purchaser, after the conveyance, or even before the conveyance in prospect of the articles for sale being carried into execution, has laid out money in lasting improvements, there are but few cases in which he will not be allowed for them, in case equity is required to relieve against the purchase.(y)

(x) *Barnes v. Racster*, 1 Yo. & Col. C. C. 401, marg. n. incorrect; *Bugden v. Big-nold*, 2 Yo. & Col. C. C. 377; *Sober v. Kemp*, 6 Hare, 155.

(y) *Edlin v. Batalay*, 2 Lev. 152; *Peter-son v. Hickman*, 1 Ch. R. 3; *Whalley v. Whalley*, 1 Ver. 484; *Savage v. Taylor*, For. 234; *Baugh v. Price*, 1 Wils. 320; *Ex parte Hughes*, 6 Ves. 617; *Ex parte James*, 8 Ves. 337; *Browne v. Odea*, 1 Sch. & Lef. 115; 9 Mod. 412; *Barnard C. R.* 450; 1 Ver. 159; *Shine v. Gough*, 1 Bal. & Beat. 444; *Thomlinson v. Smith*, Finch, 378. [Upon the rescission of a contract in consequence of the vendor's failure to complete and make the title, the vendor must take back the estate in the condition in which it may be at the time of the restoration, without compensation for the casual destruction, decay, and dilapidation of the buildings and other improvements, not caused by any culpable act or omission of the vendee. If the vendee has sold and removed, or wantonly destroyed, or injured the improvements, the vendor will be entitled to indemnity for the loss. *Taylor v. Porter*, 1 Dana, 423; *Williams v. Rogers*, 2 Dana, 375. On the other hand, if the vendee having been let into possession of the estate, has made permanent improvements upon it, he will be entitled to an allowance for the value of such improvements, which, if the vendee has had the use of them for a

time, will be calculated at the period when he surrenders them and not at the time when he made them. *Williams v. Rogers*, 2 Dana, 375; see *Lowry v. Cox*, 2 Dana, 469; *Ewing v. Handley*, 4 Litt. 370; *Bright v. Boyd*, 1 Story, 478; *Albra v. Griffin*, 2 Dev. & Bat. Eq. 9; *Goodwin v. Lyon*, 4 Porter, 297; *Parkhurst v. Van Cortlandt*, 1 John. Ch. 273. Mr. Justice Story said, in *Bright v. Boyd*, 1 Story, 478, 494: "In cases where the true owner of an estate, after a recovery thereof at law, from a *bonâ fide* possessor for a valuable consideration without notice, seeks an account in equity as plaintiff against such possessor for the rents and profits, it is the constant habit of courts of equity to allow such possessor as defendant to deduct therefrom the full amount of all meliorations and improvements, which he has beneficially made upon the estate; and thus to recoup them from the rents and profits. So if the true owner of an estate holds only an equitable title thereto, and seeks the aid of a court of equity to enforce that title, the court will administer that aid only upon the terms of making compensation to such *bonâ fide* possessor for the amount of his meliorations and improvements of the estate, beneficial to the true owner. In each of these cases, the court acts upon an old established maxim in its jurisprudence, that he who seeks equity must do equity. But it has

30. If, however, a man has acted fraudulently, and is conscious of a defect in his title, and with that conviction in his mind expends a sum of money in improvements, he is not entitled to avail himself of the expenditure.(z)

31. But if the aid of a court of equity is not required, and a person can recover the estate at law, equity, unless there be fraud, cannot, it is conceived, relieve the purchaser on account of money laid out in repairs and improvements, but must dismiss a bill for that purpose with costs.(a)

32. Where a person purchases with notice of an incumbrance, although he pay off some to which that incumbrance was posterior, yet he lets it in as the first incumbrance on the estate, and cannot, as against that incumbrance, claim the benefit of the prior incumbrances which he has paid off.(b) Even before the purchase is completed *the purchaser should take care, in paying off a prior incumbrance, that he do not lose the benefit of

been supposed that courts of equity do not and ought not to go further, and to grant active relief in favor of such a *bonâ fide* possessor, making permanent meliorations and improvements, by sustaining a bill brought by him therefor against the true owner after he has recovered the premises at law. I find that Mr. Chancellor Walworth, in *Putnam v. Ritchie*, 6 Paige, 390, 403, 404, 405, entertained this opinion, admitting at the same time that he could find no case in England or America, where the point has been expressed or decided either way. Now, if there be no authority against the doctrine, I confess that I should be most reluctant to be the first judge to lead to such a decision. It appears to me, speaking with all deference to other opinions, that the denial of all compensation to such a *bonâ fide* purchaser in such a case, where he has manifestly added to the permanent value of an estate by his meliorations and improvements, without the slightest suspicion of any infirmity in his own title, is contrary to the first principles of equity." 2 Story Eq. Jur. §§ 799 a, 799 b, 1237, 1239; *Green v. Biddle*, 8 Wheat. 1, 77, 78; *Patrick v. Marshall*, 2 Bibb, 45; *Thompson v. Ma-*

son, 4 Bibb, 197; *Craig v. Martin*, 3 J. J. Marsh. 55; *Morton v. Ridgeway*, 3 J. J. Marsh. 257; *Witherspoon v. Anderson*, 3 Desaus. 245; *M'Cracken v. Sanders*, 4 Bibb, 511; *Barlow v. Bell*, 1 A. K. Marsh. 246; *Grimes v. Shrieve*, 6 Monroe, 557; *Moore v. Cable*, 1 John. Ch. 385; *Green v. Winter*, 1 John. Ch. 26, 39; *Richardson v. M'Kinson*, Litt. Sel. Ca. 320.]

(z) *Kenny v. Browne*, 3 Ridg. P. C. 518. [See *Patrick v. Marshall*, 2 Bibb, 45; *Ormsby v. Hunton*, 3 Bibb, 298; *Van Horne v. Fonda*, 5 John. Ch. 388, 416; *Barlow v. Bell*, 1 A. K. Marsh. 246; *Howe v. Logwood*, 3 A. K. Marsh. 389; *M'Kim v. Moody*, 1 Rand. 58; *Pugh v. Bell*, 1 J. J. Marsh. 404; *Baltimore v. M'Kim*, 3 Bland, 453; *Gillespie v. Moon*, 2 John. Ch. 602.]

(a) *Needler v. Wright*, Nels. C. R. 57; but see *Peterson v. Hickman*, 1 Ch. R. 3. This case, probably, turned on the fraud in the wife standing by while the improvements were made, without giving notice of her claim to the tenant.

(b) *Toulmin v. Steerc*, 3 Mer. 210; *Rep. t. Sugd.* 251; *Chesshyre v. Biss*, 2 Giff. 287; *Selby v. Pomfret*, 1 J. & H. 336, 7 Jur. N. S. 835.

the priority.(c) Of course he cannot protect himself against his own incumbrances. Where a man made two mortgages, and the first contained a power of sale under which he himself purchased the estate, but the purchase money was not more than the amount of the first mortgage, the second mortgagee was held to still have his charge on the estate against the mortgagor and purchaser, and against subsequent incumbrancers, with notice.(d)

33. So if, being a mortgagee, he purchase with notice of an agreement to grant a lease, he is bound by it, although, being made subsequently to his mortgage, it could not have been enforced against him in his character of mortgagee.(e)

34. And if a mortgagee would avail himself of prior incumbrances which he pays off against subsequent subsisting ones, he should actually keep on foot those which he pays off, and not allow them to be extinguished.(f)

35. It seems, that where two persons claim a reversion, to which only one can be entitled, a bill will lie to perpetuate testimony, although both of them are purchasers, or only one of them is a purchaser; (g) for such a bill calls for no discovery from the defendant, but merely prays to secure that testimony, which might be had at that time if the circumstances called for it.

(c) *Watts v. Symes*, 16 Sim. 640; 1 De G., M. & G. 240; *Selby v. Pomfret*, 1 J. & H. 336.

(d) *Otter v. Ld. Vaux*, 2 K. & J. 650; 6 De G., M. & G. 638; *Bevan v. Habgood*, 1 J. & H. 222.

(e) *Smith v. Phillips*, 1 Ke. 694; see *Hunt v. Bishop*, 9 Ex. 675; *Walcott v. Condon*, 3 Ir. Ch. R. 1; *inf. s. 2*, pl. 4, 5.

(f) *Parry v. Wright*, 1 Sim. & Stu. 369; 5 Russ. 142, *sed qu.*; *Brown v. Stead*,

5 Sim. 525; *Harman v. Forster*, 1 Dru. & Wal. 637; *Barker v. Roe*, 1 Lon. & Tow. 655; *Farrow v. Rees*, 4 Beav. 18; *Medley v. Horton*, 14 Sim. 226; *Unthank v. Gabbett*, Beat. 453; *Rotherham v. Flynn*, *ib.* 555; *Squire v. Ford*, 9 Hare, 60; *Phillips v. Gutteridge*, 4 De G. & J. 531; *In re Gardiner*, 11 Ir. Ch. Rep. 519.

(g) *Ld. Dursley v. Fitzhardinge*, 6 Ves. 251, *et qu.*

* SECTION II.

OF THE EFFECT OF NOTICE.

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| <ol style="list-style-type: none"> 1. Notice binds a purchaser. 2. Purchaser with notice bound by parol agreement for a lease. 3. So by an agreement as to a judgment. 4. Purchaser whose consent is necessary to validity of a lease, not bound by notice. 5. <i>Wood v. Lord Londonderry</i>. 6. Right of legatee against seller. 7. Purchaser bound by void estate where he buys subject to it.—So he cannot impeach annuity. 8. Vendor may set aside leases for fraud after sale of fee : <i>qu</i>. | <ol style="list-style-type: none"> 9. Lease under power at inadequate rent apparent; sale of reversion voidable. 10. Purchase under decree obtained by fraud. 11. Notice before payment or execution of conveyance sufficient. 13. Notice at time of procuring an estate to protect, inoperative. 14. Purchaser without notice safe, although seller to him bought with notice.—Purchaser may buy with notice of a purchaser who bought without. 15. Trustee selling and repurchasing, bound. 16. Notice of voluntary settlement not binding. |
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1. WE have hitherto been considering cases where the purchaser had not notice, for a purchaser with notice is in equity bound to the same extent, and in the same manner, as the person was of whom he purchased. (a) And a purchaser with notice

(a) *Winged v. Lefebury*, 1 Eq. Ca. Ab. 32; *Jackson's case*, Lane, 60; *Gore v. Wiglesworth*, *Id.*; *Earl Brook v. Bulkeley*, 2 Ves. 498; *Taylor v. Stibbert*, 2 Ves. jr. 437; *Ld. Verney v. Carding*, 1 Sch. & Lef. 345; *Crofton v. Ormsby*, 2 Sch. & Lef. 583; *Dunbar v. Tredennick*, 2 Bal. & Beat. 304; [*Case v. James*, 29 Beav. 512; *Truesdell v. Calloway*, 6 Miss. 605; *Cory v. Eyre*, 1 De G., J. & S. 149; *Peebles v. Reading*, 8 Serg. & R. 495; *Reed v. Dickey*, 2 Watts, 459; *Hood v. Fahnestock*, 1 Barr, 470; *Denn v. McKnight*, 6 Halst. 385; *Wilkins v. Anderson*, 1 Jones, 399; *Patten v. Moore*, 32 N. H. 382; *Wilson v. Holcomb*, 13 Iowa, 110; *Murray v. Finster*, 2 John. Ch. 155, 157; *ante*, 728, note (t); *Champion v. Brown*, 6 John. Ch. 398, 403; *Frost v. Beekman*, 1 John. Ch. 288, 301; *Murray v. Ballou*, 1 John. Ch. 556; *Shepherd v. M'Evers*, 4 John. Ch. 136; *Simon v. Gibson*, 1 Yeates, 291; *Davison v. Waite*, 2 Munf. 557; 1 Story Eq. Jur. §§ 395, 396, 789; *Smith v.*

Daniel, 2 McCord, Ch. 149; *Cox v. Osburn*, 1 A. K. Marsh. 311; *Edwards v. Morris*, 2 A. K. Marsh. 67; *Liggett v. Wall*, 2 A. K. Marsh. 149; *Mercer v. Blain*, Lit. Sel. Cas. 412; *Wardsworth v. Wendell*, 5 John. Ch. 229; *Breedlove v. Stump*, 3 Yerger, 257; *Massey v. McIlwain*, 2 Hill Ch. 426; *Wormley v. Wormley*, 8 Wheat. 421; *Olive v. Piatt*, 3 How. (U. S.) 333; *Caldwell v. Carrington*, 9 Peters (U. S.), 86; *Wright v. Dame*, 22 Pick. 55. A purchaser, with notice of a previous contract by his vendor to convey the estate to a third person, holds it subject to the rights of the vendee in such contract, although such vendee is bound by the previous contract only at his election, and can compel specific performance only of parts, with compensation for deficiency; thus, A. contracted with B. for the purchase in fee of property in ignorance that B. was entitled only to an estate *per autre vie*, and that C. (B.'s wife) was entitled to the remainder in fee, on

of a prior sale, cannot avail himself of the legal title of a prior mortgagee whom he has paid off, to defeat the prior purchaser.(b) And even where a seller has bound himself in equity by standing by and encouraging an act, *e. g.* the cutting of a canal through the estate, a purchaser who bought with notice of the acts will be deemed to have bought subject to the implied condition that the canal was to remain, and was to be used for the benefit of the public forever thereafter.(c) The defence of want of notice would fail if not at once made the ground of defence.(d)

2. A purchaser will be bound, even at law, by a parol agreement for a lease not within the statute of frauds, the granting of which constituted part of the consideration, although it be not mentioned in the agreement for purchase, and the rent be not fixed.(e)

* 3. And a judgment against the seller made a security to perform an agreement beyond the penalty with interest, of which agreement the purchaser has notice, will bind him at law, so that he cannot require satisfaction to be entered upon payment of the amount of the judgment with interest.(f)

4. But although the *consent* of a person is essential to the validity of a lease agreed to be granted, and he himself purchases the inheritance with full notice, yet he will not be bound by the agreement. This was decided in a case, where a copyholder granted a lease to one Luffkin for a year, and so from year to year, if the lord would give a license. The lord purchased the

the determination of the particular life. D. with full knowledge of A.'s contract, took a conveyance from B. and C. of the property, acknowledged by C. so as to pass her interest, and it was held that A. was entitled, by way of specific performance, to a conveyance from D. of B.'s interest, with compensation in respect of C.'s interest, which B. was unable to bind or convey without her consent. *Barnes v. Wood* L. R. 8 Eq. 424; *Castle v. Wilkinson*, L. R. 5 Ch. Ap. 536, 537; see *Nelthorpe v. Holgate*, 1 Col. 203; *Thomas v. Dering*, 1 Keen, 729; see *ante*, 175, note. A purchaser of mortgaged premises, who at the time of his purchase has either act-

ual notice of the mortgage, or constructive notice thereof by means of the registry, is bound by the previous acknowledgment of the person under whom he claims of the existence of the indebtedness within twenty years. *Heyer v. Pruyn*, 7 Paige, 465.] *9 Wheat 489; 10 Rickes 582*

(b) *Scott v. Dunbar*, 1 Mol. 422; *Field v. Boland*, 1 Dru. & Wal. 37; *Biscoe v. Perkins*, 1 Ves. & Bea. 485; *Biscoe v. Wilks*, 3 Mer. 456.

(c) *Duke of Beaufort v. Patrick*, 17 Beav. 60, 74, 78.

(d) *Lyne v. Lyne*, 27 L. T. 268.

(e) *Denn v. Cartright*, 4 East, 29.

(f) *Crofts v. Wilkinson*, 4 Q. B. 74.

reversion himself, and took a surrender in the name of a trustee. The lease was correctly stated in the abstract; the agreement contained an exception of all subsisting leases (if any there were), and in a deed from the vendor to the purchaser's trustee, there was an exception in the covenant against incumbrances "of the several and respective subsisting lease or leases, or agreements for leases, under which the present tenants now hold the premises." After the purchase, the lord gave notice to his trustee that he would not grant any license to any copyholder of his manor to demise. The trustee then gave notice to Luffkin to quit, and brought an ejectment, in which he recovered, the court of K. B. being of opinion that the lease did not operate as a lease for a continuing term.(g) Then Luffkin filed a bill against the trustee and the lord for a specific performance, on the ground of the lord having notice of the lease, and of its being excepted in the contract, &c. A case was directed to the C. P., who held, first, that the lease was not for a continuing term; and, secondly, that the tenant had no remedy on the covenant in the lease for quiet enjoyment.(h) The cause then came on upon the equity reserved, and was fully argued by Romilly for the plaintiff, and by Hollist and Bosanquet for the defendants. And Lord Eldon, after taking a day to consider, pronounced judgment shortly, that there was not equity sufficient to support the bill.(i) This decision seems founded on great principles of equity, although the purchaser had voluntarily placed himself in a situation in which it was his interest to refuse his consent, without which the lease could not be sustained. We cannot fail to distinguish this case from that where a man, having a partial interest in an estate, agrees to grant a lease which his interest does not enable him to grant; and then joins with the remainder-man in selling the estate to a purchaser, with full notice of the agreement.(k) There equity holds the purchaser * bound by the agreement.(l)

(g) *Doe v. Luffkin*, 4 East, 221.

(h) 1 New R. 163; see *Nokes v. Gibbon*, 3 Drew. 681, *qu.* the nature of the deed of 2d Mar. 1854; see *Ib.* 735.

(i) Ch. 15th July, 1805, MS.; *Luffkin v. Nunn*, 11 Ves. 170.

(k) *Taylor v. Stibbert*, 2 Ves. jr. 437; *Llo. & Goo. t. Sugd.* 218; *Sugd. Pow.*

(8th edit.) 765; 1 Hay. & J. 83; *Brereton v. Tuokéy*, 8 Ir. C. L. R. 190; *Jay v. Richardson*, 31 L. J. N. S. 398; *supra*, ch. 16, s. 1.

(l) *Steele v. Mitchell*, 2 Dru. & Wal. 596; 3 Ir. E. R. 11, referring to the 9th edition of this work, in which the passage was, "There equity rightly holds the pur-

The vendor was bound to grant the lease, or to answer in damages for non-performance of the agreement; and as the purchaser had notice of the contract, and takes an estate which enables him to perform it, he is compelled to do so, in order to exonerate the vendor from an action for breach of the contract. And on this ground it should seem, that if in *Luffkin v. Nunn*, Luffkin could have recovered on the covenant for quiet enjoyment, the lord would have been compelled to perform the agreement. If this had not been Lord Eldon's opinion, he would not have asked the common pleas whether Luffkin could recover on the covenant for quiet enjoyment.^(m) Lord Redesdale found fault with one point in the case of *Taylor v. Stibbert*, viz., he thought the purchaser had a right to say, that having purchased from the son as well as the father, *and the covenant not being binding on the son's estate*, he should not be bound further than as he purchased an estate which was bound, and therefore that notice, or no notice, was of no consequence to him.⁽ⁿ⁾ The doctrine, however, can only apply to cases where the purchaser ought to indemnify the seller against the agreement.

5. But where after a grant for a term of years (1) renewable of a way-leave at an annual rent for the way-leave, and an acreage rent to the tenants of the estate for damages, with liberty to the lessee to quit with a year's notice, the grantor sold by auction the estate to A., but reserving for sale by separate lot the way-leave rent, and part of this rent was sold to B.; and upon the expiration of the current lease A., who had bought the land, and the lessee agreed to put an end to the former grant, and A. granted a new lease upon different terms to the lessee, and they both denied B.'s title, as purchaser of part of the former way-leave rent to any portion of the new rent; it was held that B.'s right was not affected by the attempt of A. to obtain the way-leave rent sold to B., and subject to which he bought. The lessee had not *bonâ fide* determined the original

chaser bound by the agreement." Sugd. 596; *Postlethwaite v. Lewthwaite*, 8 Jur. N. S. 791.
Pow. (8th ed.) 765.

(m) *Steele v. Mitchell*, 2 Dru. & Wal.

(n) 2 Sch. & Lef. 599; Sugd. Pow. (8th ed.) 766; 2 Dru. & War. 304.

(1) The tenure of the estate and the licenses to demise do not touch this question.

grant to him, and therefore no question arose in regard to the effect which such a determination would have had.(o)

6. Where a remainder-man's estate was charged with a legacy by a will, and he bought the life estate, and obtained a conveyance from the testator's heir, and then sold the fee to a purchaser with notice, both parties believing the estate not to be liable to the legacy, and the conveyance was silent as to the legacy, it was considered that the seller * was not a trustee for the legatee, as to so much of the purchase money as would answer the legacy, and that the purchaser had no remedy against the seller, who was not personally bound by the legacy.(p)

7. Where a purchaser buys a reversion expectant upon a particular estate, as, subject to the life estate of I. S., although it turn out that no such estate is in existence, yet I. S. will be decreed to hold the estate during his life, against the purchaser.(q) So where a man granted an annuity which was clearly voidable, and afterwards sold the estate, the purchaser was not allowed to impeach the annuity.(r)

8. In Ireland, where a purchaser set aside the leases subsisting at the time of the sale, he was decreed to be a trustee for the vendor.(s) And it was treated as clear, that if an estate be sold subject to existing leases, and the vendor discover that the leases he had granted were obtained from him by fraud, he would be entitled to set them aside, and to hold the estate during the continuance of such leases, paying the rents to the purchasers thereby reserved, and performing the covenants in the leases.(t) And upon this principle, where a devisee in fee, subject to an executory devise over in fee, suffered a recovery, and sold the estate, and received all the money, and he and the devisee over joined in the conveyance (which of course operated as a release of the executory interest), subject to leases granted by the first devisee, it was decided that the devisee over (the event having

(o) *Wood v. Ld. Londonderry*, 10 Beav. 465.

(p) *Jillard v. Edgar*, 13 Jur. 1114; 3 De G. & Sm. 502.

(q) *Walton v. Stanford*, 2 Ver. 279; *Doe v. Archer*, 1 Bos. & Pul. 531.

(r) 1 Mol. 453; it must be understood that the purchaser bought subject to the

annuity; *Dowell v. Dew*, 1 Yo. & Col. C. 345; *Bannatyne v. Barrington*, 9 Ir. Ch. Rep. 439; *Dru. t. Napier*, 459.

(s) 2 Bal. & Beat. 548.

(t) 2 Bal. & Beat. 547; *Maguire v. Armstrong*, 2 Bal. & Beat. 538; *Black-ency v. Bagott*, 3 Bligh N. S. 248; *Dowell v. Dew*; 1 Yo. & Col. C. 345.

happened upon which it was to arise) was entitled to impeach the leases for his own benefit, securing to the purchaser the rents and the benefits of the agreements.^(u) But all these points are of great importance, and will require, it is apprehended, much further consideration before they can be adopted as binding rules.

9. But where a lease is granted under a power by a tenant for life on an inadequate rent, and the inadequacy is apparent, and then the estate is sold under a power of sale in the settlement at a price in proportion to the rent reserved, the remainder-man may, it is said, set aside not only the lease, but the sale.^(x)

10. Although a man purchase under a decree in equity, yet if the decree was obtained by fraud, he cannot protect himself.^(y)

11. Notice, before actual payment of all the money,^(y¹) although it be *secured,^(z) and the conveyance actually exe-

(u) *Muskerry v. Chinnery*, Llo. & Goo. t. Sugd. 217; *Llo. & Goo. t. Plunk.* 195, 202, 203; 7 Cl. & Fin. 1; 1 H. L. Cas. 576; Sugd. H. of L. 465, 666; *Dixon v. Wilkinson*, 1 Eq. Rep. 556.

(x) *Llo. & Goo. t. Sugd.* 218, 219; *Sugd. Pow.* (8th ed.) 619.

(y) *Kennedy v. Daly*, 1 Sch. & Lef. 355; *Giffard v. Hort*, *Ib.* 386; *Bell v. Bell*, Llo. & Goo. t. Plunk. 44; 2 Atk. 631; see *Ib.* 390; *Fermor's case*, 3 Rep. 79 a; *Underwood v. Ld. Courtown*, 2 Sch. & Lef. 68.

(y¹) *Haughwout v. Murphy*, 7 C. E. Green, 547, 548. Where a vendee has paid for land, partly in money and partly in a preëxisting debt, he is entitled to be regarded a *bonâ fide* purchaser as against a prior unrecorded deed only to the extent of the money actually paid. *Pickett v. Barron*, 29 Barb. 505; *Glinsk v. Zawadski*, 8 Florida, 405.

(z) *Tourville v. Naish*, 3 P. Wms. 307; *Story v. Ld. Windsor*, 2 Atk. 360; *Moore v. Mayhew*, 1 Ch. C. 34; 2 Free. 175, pl. 235; see *Woods v. Martin*, 11 Ir. Ch. Rep. 148; *supra*, ch. 13, s. 2; [*Heatley v. Finster*, 2 John. Ch. 159; *Jewett v. Palmer*, 7 Cowen, 65; *Jackson v. Cadwell*, 1 Cowen, 622; *Murray v. Ballou*, 1 John. C. 566; *Harris v. Norton*, 16 Barb. 264; *Christie*

v. Bishop, 1 Barb. Ch. 105; *High v. Batte*, 10 Yerger, 555; *McBee v. Loftes*, 1 Strobb. Eq. 90; *Patten v. Moore*, 32 N. H. 382; *Losey v. Simpson*, 3 Stockt. (N. J.) 246; *Campbell v. Campbell*, 3 Stockt. (N. J.) 268; *Keys v. Test*, 33 Ill. 316; *Blanchard v. Tyler*, 12 Mich. 339. A person who has contracted for the purchase of land, may compel any one who, after such contract and with notice of it, takes the legal title from the vendor, to perform the contract. The subsequent purchaser, to hold the title against such contract of sale, must be a *bonâ fide* purchaser without notice, and must have paid the purchase money. If part of the purchase money remains unpaid after the sale, as to such part such second purchaser is not protected, but it may be claimed by the prior purchaser. But in such case the purchaser will hold the legal title conveyed to him free from any claim under the prior contract, except to the purchase money not paid until after notice of the contract. That a mortgage was given as security for the payment of the unpaid purchase money, is not sufficient to protect such subsequent purchaser. He is only protected as to money actually paid before notice. *Haughwout v. Mur-*

cuted,(a) or before the execution of the conveyance, notwithstanding that the money be paid,(b) is equivalent to notice before the contract.(b¹) And even where the property was assigned to the purchaser, and a check given by him for the price on a Saturday, of which he stopped the payment on Monday, but two days afterwards allowed it to be paid, he was fixed with an incumbrance, of which he first had notice only the day before the actual payment, although if the check had been paid on the Monday he would not have been liable to it.(c)

phy, 6 C. E. Green (N. J.), 118 ; see *Flagg v. Mann*, 2 Sumner, 566 ; *Wells v. Morrow*, 38 Ala. 125.]

(a) *Jones v. Stanley*, 2 Eq. Ca. Ab. 685.

(b) *Wigg v. Wigg*, 1 Atk. 384. [And the general proposition is said to be supported by the weight of authority, that if the purchaser has paid the purchase money, but has not actually taken the title when he receives notice, he takes the title subject to all the equities that attach to it when the conveyance is actually made to him, as he then has the right to refuse the conveyance and to demand back his money. *Perry Trusts*, § 221 ; *Warner v. Winslow*, 1 Sandf. Ch. 430 ; *Peabody v. Fenton*, 3 Barb. Ch. 464, 465 ; *Vattier v. Hinde*, 7 Peters (U. S.), 252 ; *Bush v. Bush*, 3 Strobb. Eq. 131 ; *Kyle v. Tait*, 6 Grattan, 44 ; *Duncan v. Johnson*, 2 Eng. 190 ; *Cook v. Bronaugh*, 8 Eng. 190 ; *Cole v. Scott*, 2 Wash. 141 ; *Kerr F. & M.* (1st Am. ed.) 319, 320. But in 2 Dart V. & P. (4th Eng. ed.) 760, the learned author states the proposition in the text in a more guarded form ; and in regard to the case of *Wigg v. Wigg*, cited in support of it, he says : "The particular facts do not clearly appear by the report ; and the point is one which will, it is conceived, require much consideration when it again arises. There may be a difference between getting in the legal estate from the vendor himself, supposing him to have been privy to the prior charge, and getting it in from a bare trustee or mortgagee. In the latter case it seems difficult, consistently with the general rule now under discussion, to deny the purchaser's right

to protection ; nor does there seem to be any sufficient reason for denying it even in the former case." See, also, *Kerr F. & M.* (1st Am. ed.), 320, 321. The money must be wholly paid, before notice, in order to afford the purchaser protection. *Wormley v. Wormley*, 8 Wheat. 421 ; *Wood v. Mann*, 1 Sumner, 506 ; *Lewis v. Phillips*, 17 Ind. 108 ; *Wells v. Morrow*, 38 Ala. 125. But it is held in Pennsylvania that part payment of the purchase money before notice will give the purchaser an equity *pro tanto*. *Youst v. Martin*, 3 Serg. & R. 423 ; *Lewis v. Bradford*, 10 Watts, 67 ; *Bellus v. McCarthy*, 10 Watts, 13 ; *Juvenal v. Jackson*, 14 Penn. St. 519 ; *Beck v. Uhrich*, 13 Penn. St. 631 ; 16 Penn. St. 499 ; *Paul v. Fulton*, 25 Missou, 156 ; and see *Frost v. Beekman*, 1 John. Ch. 288 ; *Haughwout v. Murphy*, 6 C. E. Green, 118.]

(b¹) [*Williams v. Hollingsworth*, 1 Strobb. Eq. 103 ; *Frost v. Beekman*, 1 John. Ch. 288, 301 ; 4 Kent (11th ed.), 180 ; *Boone v. Chiles*, 10 Peters (U. S.), 177, 211, 212 ; *Gallion v. M'Caslin*, 1 Blackf. 91 ; *Gouverneur v. Lynch*, 2 Paige, 300 ; *Grimston v. Carter*, 3 Paige, 421 ; *Merritt v. Lambert*, 1 Hoff. Ch. 166 ; *Blair v. Owen*, 1 Munf. 38 ; *Hoover v. Donally*, 3 Hen. & M. 316 ; *Wilcox v. Galloway*, Wash. 41 ; *Doswell v. Buchanan*, 3 Leigh, 365 ; *Hunter v. Simrall*, 5 Litt. 62 ; *Ells v. Tousley*, 1 Paige, 280 ; *Sims v. Richardson*, 2 Litt. 276 ; *Wood v. Mann*, 1 Sumner, 506 ; *Ely v. Scofield*, 35 Barb. 330 ; *Kilcrease v. Lum*, 36 Miss. 569 ; *Beaty v. Whitaker*, 23 Texas, 526.]

(c) *Tildesley v. Lodge*, 3 Sm. & Gif. 543.

12. But if the conveyance be executed, and the money paid, a purchaser will not be affected by notice of an incumbrance, although a prior incumbrance, intended to be discharged, is not paid off.(d)

13. And notice at the time of getting in a precedent incumbrance, as a protection against mesne charges, is not material, so that he had not notice at the time of the purchase.(e)

14. But although a purchaser has notice of an equitable claim by which his conscience is affected, yet a person purchasing from him *bonâ fide*, and without notice of the right, will not be bound by it.(f) So, on the other hand, a person with notice of an equitable claim may safely purchase of a person who bought *bonâ fide*, and without notice of it; (g) although this circumstance may influence the court with respect to costs.(h) And

(d) *Meynell v. Garraway*, Nels. C. R. 63.

(e) *Cockes v. Sherman*, 2 Free. 13; 2 Ves. 574.

(f) *Ferrars v. Cherry*, 2 Ver. 384; *Mertins v. Joliffe*, Amb. 313; *Lowther v. Carleton*, Barnard R. C. 358; For. 187; 2 Atk. 242; *Pitts v. Edelford*, Tot. 284; [*Trulock v. Peeples*, 3 Kelly, 446; *Malory v. Stodder*, 6 Ala. 801; *Curtis v. Lunn*, 6 Munf. 42; *Lacy v. Wilson*, 4 Munf. 313; *Lindsey v. Rankin*, 4 Bibb, 482; *Bumpus v. Platner*, 1 John. Ch. 213; *Lewin Trusts* (5th Eng. ed.), 617; *Hagthorpe v. Hook*, 1 Gill & J. 273; *Demarest v. Wynkoop*, 3 John. Ch. 147; *Jackson v. Given*, 8 John. 137; *Coffin v. Ray*, 1 Met. 214, 215; *Flynt v. Arnold*, 2 Met. 623; *Somes v. Brewer*, 2 Pick. 184; *Bean v. Smith*, 2 Mason, 252; *Wood v. Mann*, 1 Sumner, 506; *Trull v. Bigelow*, 16 Mass. 406; *Glidden v. Hunt*, 24 Pick. 225, 226; 1 Dan. Ch. Pr. (4th Am. ed.) 674, note (5); *Brackett v. Ridlon*, 54 Maine, 433; 1 Story Eq. Jur. §§ 409, 410; *Lawrence v. Stratton*, 6 Cush. 167; *Dana v. Newhall*, 13 Mass. 498; *Pierce v. Faunce*, 47 Maine, 507, 513, 514. Though a second grantee have notice of a prior unregistered deed of the land conveyed to him, yet his creditors are not affected by his knowledge thereof; and if they, without knowledge of such

deed, attach the land and levy thereon, they will hold it against the first grantee; although they may have such knowledge before levy of execution. *Coffin v. Ray*, 1 Met. 212; see *Trull v. Bigelow*, 16 Mass. 406; *Glidden v. Hunt*, 24 Pick. 225, 226.]

(g) *Harrison v. Forth*, Pre. C. 51; 1 Eq. Ca. Ab. 331, pl. 6; *Brandlyn v. Ord*, 1 Atk. 571; *Sweet v. Southcote*, 2 Bro. C. C. 66; 2 Dick. 671; *Lowther v. Carleton*, 2 Atk. 242; *Andrew v. Wrigley*, 4 Bro. C. C. 125; [*Trulock v. Peeples*, 3 Kelly, 446; *Hill v. Paul*, 8 Miss. 479; *Bracken v. Miller*, 4 Watts & S. 102; *Bumpus v. Platner*, 1 John. Ch. 213; *Lacy v. Wilson*, 4 Munf. 313; *Boynnton v. Rees*, 8 Pick. 329; *Boone v. Chiles*, 10 Peters (U. S.), 177; 1 Story Eq. Jur. §§ 409, 410; 1 Dan. Ch. Pr. (4th Am. ed.) 569, note (7), 674, & note (5); *Varick v. Briggs*, 6 Paige, 329; *Griffith v. Griffith*, 1 Hoff. Ch. 163; 9 Paige, 315; *Mott v. Clarke*, 9 Barr, 399; 4 Kent (11th ed.), 179; *Kerr F. & M.* (1st Am. ed.), 316; *Holmes v. Stout*, 3 Green Ch. 492; *Fenno v. Sayre*, 2 Ala. 458; *Myers v. Peck*, 2 Ala. 648; *Webster v. Van Steenbergh*, 46 Barb. 211; *Pierce v. Faunce*, 47 Maine, 507; *Suiter v. Turner*, 10 Iowa, 517.]

(h) *Andrew v. Wrigley*, *ubi sup.*

this rule has not been extended to the case where the several estates are equitable, so that a purchaser of such an estate with notice of a like prior estate could not, it was held, give a better title than he had to a purchaser without notice.⁽ⁱ⁾ A purchaser would not be compelled to accept a title depending upon proof of the seller not having had notice of an incumbrance.^(k)

15. But although a purchaser buying from a trustee without notice, would be protected, yet the trustee would still be bound by the trust were he to repurchase the estate, for his liability did not cease by the sale.^(l)

16. We have before seen, that notice of a voluntary settlement does not affect a purchaser under the statute of Elizabeth.^(m)

(i) *Ford v. White*, 16 Beav. 120, which consider.

(k) *Freer v. Hesse*, 4 De G., M. & G. 495.

(l) *Kennedy v. Daly*, 1 Sch. & Lef. 379; *Bovey v. Smith*, 1 Ver. 60, 84, 144, decree reversed upon circumstances. [A person, whose title to land, though regular on paper, is obnoxious to the objection of

having been obtained by fraud, cannot shield his title by conveying the premises to a *bonâ fide* purchaser, and afterwards purchasing them back. *Wells J. in Schutt v. Large*, 6 Barb. 373, 380, 381; *Bovey v. Smith*, 1 Vern. 149; 1 Story Eq. Jur. § 410; *Kerr F. & M.* (1st Am. ed.) 316.

(m) *Supra*, ch. 22, s. 1. But see *ante*, 714, note.

* CHAPTER XXIV.

OF NOTICE.

SECTION I.

WHAT AMOUNTS TO NOTICE.

1. Actual or constructive.
2. Actual notice: vague reports. — General claim. — Must be in the same transaction.
3. Constructive notice.
4. Notice to counsel, &c., is constructive notice. — So to country solicitor. — Although purchase under a decree.
5. Subsequent assent to purchase.
6. Binding, although counsel, &c., employed partially only. — Party acting for himself without knowledge bound as if a solicitor employed.
7. Notice to counsel, &c., must be in the same transaction. — Unless acts are connected, or previous act is remembered.
8. Notice to solicitor of purchaser not also solicitor for seller. — Solicitor committing fraud on seller, and acting for purchaser, the latter not bound.
9. Public statute notice: private not.
10. *Lis pendens* notice. — What is a sufficient *lis pendens*. — Laches.
11. Bill dismissed, and appeal to D. P.
12. Purchaser *pendente lite* filing a bill.
13. Effect of pendency of suit on the seller's rights.
14. *Bellamy v. Sabine*.
15. *Tyler v. Thomas*.
16. Decrees not notice. — Unless to account, or the like.
17. *Lis pendens*, unless registered, will not bind without express notice.
18. Judgments, though docketed, not notice.
19. Nor deeds registered. — Search, notice to the extent of it.
20. Act or commission of bankruptcy not notice. — Purchaser without notice not bound by secret act of bankruptcy.
21. Sufficient ground for inquiry, notice: legal estate: title deeds.
22. Buying of an agent.
23. Notice of tenancy, notice of lease, or of purchase by tenant.
24. The cases considered.
25. But notice of a past tenancy unimportant. — If tenant is underlessee, purchaser need not inquire further.
26. Lien of tenant as seller not binding where conveyance is with a receipt.
27. Notice of right to easement.
28. Statement that a bond or warrant of attorney existed, notice of equitable mortgage: *Penny v. Watts*.
29. Purchaser not inquiring for deeds bound by a deposit: *Whitbread v. Jordan*.
30. Observations on it.
31. *Dryden v. Frost*.
32. }
33. } *Colyer v. Finch*, deposit of deeds.
34. }
35. *Kennedy v. Green*.
36. *Hewitt v. Loosemore*.
37. *Atterbury v. Wallis*.
38. *Perry v. Holl*.
39. Effect of not inquiring for deeds.
40. Notice of deed misrepresented.
41. Notice of contract for redemption of land tax being by an infant.

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| <p>42. Notice of a covenant to rebuild after a fire.</p> <p>43. Purchaser of improper charity lease. — Notice of invalid lease inoperative at law.</p> <p>44. Notice of tenancy not notice of lessor's title. — Want of possession in seller not notice of adverse title.</p> <p>45. Recital, &c., leading to other facts binding.</p> <p>46. <i>Eland v. Eland</i>.</p> <p>47. Purchase from heir with notice of a will.</p> <p>48. Purchaser subject to all charges.</p> <p>49. Unusual receipt indorsed, notice: solicitor committing fraud and acting for purchaser.</p> <p>*50. Notice of bills for purchase money, notice of lien: advowson: notice of lunacy.</p> <p>51. One estate liable in equity to clear another of incumbrances: notice of deed binds.</p> <p>52. <i>Hamilton v. Royse</i>.</p> | <p>53. <i>Montefiore v. Browne</i>.</p> <p>54. <i>Peto v. Hammond</i>.</p> <p>55. Notice of contemplated deed not sufficient.</p> <p>56. Purchaser from husband under settlement bound by the wife's equities.</p> <p>58. Ambiguous recitals, mere suspicion of fraud not notice.</p> <p>59. Action against seller for misrepresentation.</p> <p>60. Court rolls not notice, <i>semble</i>.</p> <p>61. Steward of manor has notice of the admissions.</p> <p>62. Effect of notice of mortgage title.</p> <p>63. Witnessing a deed not notice.</p> <p>64. Improper settlement under articles: the latter, how far binding on a purchaser.</p> <p>65. General opinions on implied notice.</p> <p>66. <i>Jones v. Smith</i>.</p> <p>67. <i>Ware v. Lord Egmont</i>: bill for altering the law of implied notice, lost.</p> |
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1. NOTICE is either actual (*w*) or constructive; (*a*¹) but there is no difference between them in its consequence. (*a*)

2. Of actual notice it need only be remarked, as a general rule, that, to constitute a binding notice, it must be given by a person interested in the property, and in the course of the treaty for the purchase. (*a*²) Vague reports from persons not interested in the

(*w*) [See *Mayor v. Williams*, 6 Md. 235. Actual notice consists in express information of a fact, brought directly home to a party; or a knowledge of circumstances, which should lead him to a knowledge of such fact. *Mayor v. Williams*, *supra*; *Kerr F. & M.* (1st Am. ed.) 235; 2 *Dart V. & P.* (4th Eng. ed.) 784-786.]

(*a*¹) [*Griffith v. Griffith*, 1 Hoff. Ch. 153; 1 *Story Eq. Jur.* § 399.]

(*a*) *Amb.* 626; *Frosser v. Rice*, 28 *Beav.* 68; [*Kerr F. & M.* (1st Am. ed.) 235; *Wormland v. Maitland*, 35 *L. T. Ch.* 69; *Sheldon v. Cox*, 2 *Eden*, 224.]

(*a*²) [1 *Story Eq. Jur.* § 399; *Argenbright v. Campbell*, 3 *Hen. & M.* 144. The notice need not come from a party in interest. *Willcox v. Hill*, 11 *Mich.* 256. As to the meaning of *actual notice* in the statutes of some of the States, which pro-

vide that a subsequent purchaser shall be affected only by actual notice of a prior unrecorded deed, see *Curtis v. Mundy*, 3 *Met.* 405, where the court held that it was not necessary that the subsequent purchaser should have positive and certain knowledge of the existence of such prior deed, or such knowledge as he would acquire by seeing the deed, or being told thereof by the grantor. The notice is sufficient, if it be such as men usually act upon in the ordinary affairs of life. But it is not sufficient to prove facts, that would reasonably put the subsequent grantee on inquiry. He is not bound to inquire. Evidence of open occupation, possession, and cultivation of the land, and fencing it, by a party who has an unrecorded deed thereof, is not sufficient to warrant the inference that a third person had

property will not affect the purchaser's conscience; (*a*³) nor will he be bound by notice in a previous transaction which he may have forgotten. (*b*) And not only a mere assertion, that some other person claims a title is not sufficient, but, perhaps, a general claim is not sufficient to affect a purchaser with notice of a deed, of which he does not appear to have had knowledge. (*c*) And the notice to the purchaser must be in the same transaction. (*d*) The rule is settled that a purchaser is not bound to attend to vague rumors — to statements by mere strangers; that a notice, in order to be binding, must proceed from some person interested in the property. (*e*)

3. Constructive notice, in its nature, is no more than evidence of notice, the presumptions of which are so violent, that the court will not allow even of its being controverted; (*f*) but

any notice of such deed. *Pomroy v. Stevens*, 11 Met. 244; *Mara v. Pierce*, 9 Gray, 307; *Parker v. Osgood*, 3 Allen, 489; *Dooley v. Walcott*, 4 Allen, 406; see *Richardson v. Smith*, 11 Allen, 134; *Pike v. Goodnow*, 12 Allen, 472, 474; *George v. Kent*, 7 Allen, 16, 18; *Sibley v. Leflingwell*, 8 Allen, 584; *Spofford v. Weston*, 29 Maine, 140; *Butler v. Stevens*, 26 Maine, 484, 490; *Lawrence v. Stratton*, 6 Cush. 163, 168; *Hennessey v. Andrews*, 6 Cush. 170; *Hoffing v. Burnham*, 2 Iowa, 39; *Beattie v. Butler*, 21 Missou. 313; *Wallace v. Craps*, 3 Strobb. 266; *Martin v. Sale*, 1 Bailey Eq. 24; *Fleming v. Burgin*, 2 Ired. Eq. 584; 2 Lead. Cas. in Eq. (3d Am. ed.) 189 *et seq.* in note to *Le Neve v. Le Neve*; *Hood v. Fahnestock*, 1 Barr, 470; *Scott v. Gallagher*, 14 Serg. & R. 333; *Siter v. McClanachan*, 2 Grattan, 280, 313; *Lawrence v. Tucker*, 7 Greenl. 195; *Dodge v. Nichols*, 5 Allen, 548; *Dickerson v. Campbell*, 32 Missou. 544; *ante*, 728, note.]

(*a*³) [See *Greenslade v. Dare*, 20 Beav. 284; *Flagg v. Mann*, 2 Sumner, 487; *Kerr F. & M.* (1st Am. ed.) 235, 239; 1 Story Eq. Jur. 400 *a*; *Jackson v. Given*, 8 John. 137, 141; *Currens v. Hart*, Hardin, 37; *Butler v. Stevens*, 26 Maine, 484; *Black v. Thornton*, 31 Geo. 641.]

(*b*) *Wildgoose v. Weyland*, Gould. 147; *Cornwallis's case*, Tot. 254.

(*c*) *Jolland v. Stainbridge*, 3 Ves. 478; *Fry v. Porter*, 1 Mod. 300; *Butcher v. Stapeley*, 1 Ver. 363.

(*d*) *East Grimstead's case*, Duke, 640; the cases *inf.* as to notice to an agent; 1 Ves. jr. 425; *Hamilton v. Royse*, 2 Sch. & Lef. 327; *Mountford v. Scot*, 3 Mad. 34; 1 Tur. & Rus. 274.

(*e*) *Barnhart v. Greenshields*, 2 Eq. R. 1227, *per Cur.* 9 Moo. P. C. 18; [*Flagg v. Mann*, 2 Sumner, 551; *Buttrick v. Holden*, 13 Met. 355, 357, 358. Notice of an incumbrance to a trustee should be made out by proof that the mind of the trustee has in some way been brought to an intelligent apprehension of the nature of the incumbrance which has come upon the property, so that a reasonable man, or an ordinary man of business, would act upon the information, and would regulate his conduct by it in the execution of the trust. Lord Cairns L. C. in *Lloyd v. Banks*, L. R. 3 Ch. Ap. 490, 491.]

(*f*) 2 Anst. 438; [*Fielden v. Slater*, L. R. 7 Eq. 523; *Wilson v. Hart*, L. R. 1 Ch. Ap. 463; *Rogers v. Jones*, 8 N. H. 364; 1 Story Eq. Jur. § 399; 4 Kent (11th ed.), 179; *Penny v. Watts*, 1 Mac. & G. 150, note (2), and cases; *Matson v. Denis*, 12 W. R. 596; *Griffith v. Griffith*, 1 Hoff. Ch. Rep. 153; *Brush v. Ware*, 15 Peters (U. S.), 93; *Rogers v. Jones*, 8 N. H. 264; *Hewitt v. Loosemure*, 9 Hare,

courts of equity will not extend the doctrine to cases to which it has not hitherto been held applicable. The question upon constructive notice is not whether the purchaser had the means of obtaining, and might, by prudent caution, have obtained the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence.(g)

449; *Williamson v. Brown*, 15 N. Y. 354; *Birdsall v. Russell*, 29 N. Y. 250. Notice to a subsequent purchaser or mortgagee, of a prior deed or mortgage, must be direct and positive. A notice that is merely sufficient to put a party on inquiry is not enough. Nor is a suspicion of notice sufficient. *Fort v. Burch*, 6 Barb. 60; 4 Kent (11th ed.), 171, 172; *Tuttle v. Jackson*, 6 Wend. 226; *Jackson v. Van Valkenburgh*, 8 Cowen, 260; *Jackson v. Given*, 8 John. 137; *Mundy v. Vawter*, 3 Grattan, 518; *Doe v. Reed*, 4 Scam. 117; *Miller v. Fraley*, 23 Ark. 735; *Lemay v. Poupenez*, 35 Missou. 71. Implied notice of a prior unregistered deed, to avoid a subsequent deed or attachment, must be not merely a probable, but a necessary and unquestionable inference from the facts proved. *M'Mechan v. Griffing*, 3 Pick. 149; *Pomroy v. Stevens*, 11 Met. 244, 247; *Jackson v. Elston*, 12 John. 452; *Dey v. Dunham*, 2 John. Ch. 182; *Jackson v. Given*, 8 John. 137; *Jackson v. Sharp*, 9 John. 163; *Jackson v. Burgott*, 10 John. 457; *Jackson v. Winslow*, 9 Cowen, 13; *Norcross v. Widgery*, 2 Mass. 509; *Lawrence v. Tucker*, 7 Greenl. 195; *ante*, 728, note. To render notice of a fact in a newspaper binding upon a party, it must at least be shown that he read it; it is not enough to show that he was in the habit of reading the paper. *Lincoln v. Wright*, 23 Penn. St. 76; *Curtis v. Mundy*, 3 Met. 408.]

(g) *Ware v. Ld. Egmont*, 4 De G., M. & G. 473, [Am. ed. 460, note (1);] *Atty. Gen. v. Stephens*, 6 De G., M. & G. 148; [*Buttrick v. Holden*, 13 Met. 355; 2 Lead. Cas. in Eq. (3d Am. ed.), [38], 138, and 152 *et seq.* in note to *Le Neve v. Le Neve*; *Dexter v. Harris*, 2 Mason, 536, 537;

Flagg v. Mann, 2 Sumner, 555, 556; *Smith v. Lambeth*, 15 La. An. 566; *Montefiore v. Browne*, 7 H. L. Cas. 241; *Kerr F. & M.* (1st Am. ed.) 237-240, where this point of constructive notice is fully examined. The comments of Mr. Dart upon this subject are also worthy of consideration, 2 Dart V. & P. (4th Eng. ed.) 787, *et seq.*; *Wilson v. Miller*, 16 Iowa, 111. If one have knowledge of distinct facts, affecting the title of land which he is about to purchase, he is not at liberty to close his eyes, and then screen himself under a plea of ignorance of other facts connected with those facts already known to him; but he is bound in good faith to make reasonable inquiry, and will be presumed to have done so, and will be affected with notice of all such facts as he might have learned by such inquiry. *Blaisdell v. Stevens*, 16 Vt. 179; *Williams v. Fullerton*, 20 Vt. 346; *Bancroft v. Consen*, 13 Allen, 50, 51; *Blatchley v. Osborn*, 33 Conn. 226; *Bacon v. O'Connor*, 25 Texas, 213; *Cox v. Milner*, 23 Ill. 476. The above rule was applied to a case, where a guardian of minor children used his wards' money to purchase land, and took a deed acknowledging the receipt of the consideration paid by him, "guardian of the minor children of," &c., but running to himself, his heirs and assigns, without otherwise referring to his guardianship. The registry of this deed, containing the above reference to the capacity of the grantee, was held sufficient to give notice to creditors of the guardian that the land was held by him in trust. *Bancroft v. Consen*, 13 Allen, 50; see *Anderson v. Layton*, 3 Bush (Ky.), 87. So the same rule was applied in a case where certain executors took a conveyance of land in payment of a debt due the estate

* 4. Notice to the purchaser's counsel, attorney, or agent,^(h)(1) although himself the vendor,⁽ⁱ⁾ or although he be concerned for

represented by them, and the consideration was stated in the deed to be received from the grantees, "executors of" the deceased testator. This was held to be sufficient declaration that they held the land in trust as executors, and notice of the trust to a purchaser. *Blaisdell v. Stevens*, 16 Vt. 179.]

(h) *Newstead v. Searles*, 1 Atk. 265; *Le Neve v. Le Neve*, 3 Atk. 646; 1 Ves. 64; [2 Lead. Cas. in Eq. (3d Am. ed.) [23], 127 *et seq.* & notes]; *Brotherton v. Hatt*, 2 Ver. 574; *Ashley v. Baillie*, 2 Ves. 368; *Maddox v. Maddox*, 1 Ves. 61; 3 Ch. C. 110; *Tunstall v. Trappes*, 3 Sim. 301; *Lenehan v. M'Cabe*, 2 Ir. E. R. 342; *Atty. Gen. v. Gower*, 2 Eq. Ca. Ab. 685, pl. 11; *Amb. 626*; [Story Agency (6th ed.), § 140; 1 Story Eq. Jur. § 408; *Astor v. Wells*, 4 Wheat. 466; *Fulton Bank v. New York & Sharon Canal Co.* 4 Paige, 127, 136, 137; *Hovey v. Blanchard*, 13 N. H. 145; *Jackson v. Winslow*, 9 Cowen, 13; *Bank of United States v. Davis*, 2 Hill, 451; *Jackson v. Sharp*, 9 John. 163; *Westervelt v. Hoff*, 2 Sandf. 98; *Barnes v. M'Christie*, 3 Penn. 67; *Sutton v. Dillaye*, 3 Barb. 529; *Ross v. Houston*, 25 Miss. 591; *Worden v. Williams*, 24 Ill. 67; 2 Dart V. & P. (4th Eng. ed.) 802 *et seq.*; *Allen v. McCalla*, 25 Iowa, 464; *Miller v. Fraley*, 21 Ark. 22; *Lawrence v. Tucker*, 7 Greenl. 195; *Griffith v. Griffith*, 9 Paige, 315; *Champlin v. Laytin*, 6 Paige, 189; *Jackson v. Van Valkenburgh*, 8 Cowen, 560; *Ingalls v. Morgan*, 10 N. Y. 178; *Reed's Appeal*, 34 Penn. St. 207; *Kerr F. & M.* (1st Am. ed.) 258-262. But notice to the solicitor, is not notice to the client, when the person giving the information knows, or has good reason to believe, that it will not be communicated to the client; *Sharpe v. Foy*, L. R. 4 Ch. Ap. 35. No-

tice to the attaching officer is not deemed notice to the creditor, even though it be communicated to the creditor after the attachment, and before the land is taken in execution; for his title commenced by the attachment, and the officer was not his agent. *Stanley v. Perley*, 5 Greenl. 369; *Coffin v. Ray*, 1 Met. 212. So notice to an attorney of a prior conveyance of land attached in the suit in which he is retained does not affect the attachment, if the client has no such notice. *Lawrence v. Tucker*, 7 Greenl. 195. The rules that a purchaser is in equity chargeable with constructive notice of facts and circumstances, which came to the knowledge of his attorney or agent for the purchase, or in the examination of the title; and that notice of a deed is constructive notice of the contents thereof; do not apply to controversies between the vendor and purchaser in relation to their own rights. These rules as to constructive notice are only adopted by the court of chancery, for the protection of the prior equitable rights of third persons against subsequent purchasers who claim in hostility to such rights. *Champlin v. Laytin*, 6 Paige, 189; S. C. 18 Wend. 407. Notice to a husband is not notice to his wife, unless he is her agent, and is engaged upon the business of the agency when he receives the notice. *Snyder v. Sponable*, 1 Hill, 567; 7 Hill, 427; cited *ante*, 753, note. How far *cestui que trust* is bound by notice to the trustee, see *Pope v. Pope*, 40 Miss. 216.]

(i) *Sheldon v. Cox*, Amb. 624; *Dryden v. Frost*, 3 My. & Cra. 670; *Majoribanks v. Hovenden*, 6 Ir. E. R. 238; *Dru. 11*; *Kennedy v. Green*, 3 My. & Ke. 699; *Hewitt v. Loosemore*, 9 Hare, 499; *Robinson v. Briggs*, 1 Sm. & Gif. 188; *Tuck-*

(1) The knowledge of the vendor's agent ought to be binding on the principal; but this in a case with powerful circumstances to entitle a purchaser to relief, was held otherwise in *Gibson v. D'Este*, 1 H. L. Cas. 605; *Sugd. H. of L.* 614.

both vendor and purchaser,(*k*) binds the latter, and notice to a solicitor in the country is notice to a purchaser, although he acts by a town agent,(*l*) and notice to the town agent of the purchaser's attorney in the country would also be notice to the purchaser, and this prevails although the purchase is made under the direction of a court of equity; and infants are equally bound with adults.(*m*)

5. And if a person, with notice of any claim, purchase an estate in the name of another without his consent, yet if he afterwards assent to it, he is bound by the notice to his agent.(*n*) So a man cannot elude the effect of having notice, by procuring the conveyance to be made to a third person.(*o*) If a man's wife was a trustee of the property, he is answerable for her, and bound by her liabilities, although he claim as a purchaser under a settlement on the marriage without notice.(*p*)

6. Although the counsel, attorney, or agent be employed only in part, and not throughout the transaction, the purchaser is equally affected by the notice. This was doubted in one case; (*q*) but in *Bury v. Bury*, Lord Hardwicke said that, "where an agent has been employed for a person in part, and not throughout, yet that affected the person with notice."(*r*) And it has even been considered that a non-professional man acting for himself would be bound, where an attorney would have discovered a fraud from the state of the deeds; (*s*) but where a purchaser, not being himself a professional man, alleges that he employed no attorney, he will find it difficult to establish that the attorney of the seller did not act for him.(*t*)

er v. Henzill, 4 Ir. Ch. Rep. 513; *Spencer v. Topham*, 22 Beav. 573.

(*k*) *Le Neve v. Le Neve*, 3 Atk. 646; *Sykes v. Bond*, 7 Jur. N. S. 1024; *Benham v. Keane*, 1 J. & H. 685; *aff'd* 31 L. J. N. S. 129. [See *Schutt v. Large*, 6 Barb. 373.]

(*l*) *Norris v. Le Neve*, 3 Atk. 26.

(*m*) *Toulmin v. Steere*, 3 Mer. 210.

(*n*) *Merry v. Abney*, 1 Ch. C. 38; 1 Eq. Ca. Ab. 330; 2 Free. 151; *Nels. C. R.* 59; *Jennings v. Moore*, 2 Ver. 609; 1 Bro. P. C. 244. [See *Hovey v. Blanchard*, 13 N. H. 145.]

(*o*) *Coote v. Mammon*, 5 Bro. P. C. by

T. 355; [*Losey v. Simpson*, 3 Stockt. (N. J.) 246.]

(*p*) *Lanham v. Pirce*, 28 L. T. 12.

(*q*) *Vane v. Ld. Barnard*, Gil. E. R. 6.

(*r*) Ch. 11th July, 1748, MS. App. 11th edit. Purch.

(*s*) *Kennedy v. Green*, 3 My. & Ke. 699, but *qu.* in that case; *Atterbury v. Wallis*, 2 Jur. N. S. 343, reversed, 8 De G., M. & G. 454, [Am. ed. note (1), and cases cited;] *Harrison v. Guest*, 2 Jur. N. S. 911, reversed 6 De G., M. & G. 424, 8 H. L. Cas. 481.

(*t*) *Atterbury v. Wallis*, *ubi sup.*

* 7. The notice to the counsel, attorney, or agent must however be in the same transaction.(u) But where one transaction is closely followed by and connected with another, or where it is clear that a previous transaction was present to the mind of the solicitor when engaged in another transaction, the notice to the solicitor is notice to the client.(x)

8. Whether a purchaser can be affected with notice to the solicitor save that which the solicitor acquires after his retainer and during his employment by the purchaser, where he is not also the vendor's attorney, is stated to be a question of great difficulty.(y) Where an attorney had committed a fraud in obtaining an estate, and afterwards, upon the selling of it, acted as the solicitor of the purchaser, the purchaser was held not to have notice of

(u) *Preston v. Tubbin*, 1 Ver. 286; *Fitzgerald v. Fauconberge*, *Fitzg.* 297; 2 Eq. Ca. Ab. 682, (D.) n. (b.); *Warrick v. Warrick*, 3 Atk. 291; *Worsley v. Ld. Scarborough*, 3 Atk. 392; *Steed v. Whitaker*, Barn. C. R. 220; *Hine v. Dodd*, 2 Atk. 275; *Lowther v. Carleton*, 2 Atk. 242; *Ashley v. Baillie*, 2 Ves. 368; 1 Ves. 435; see *Winter v. Ld. Anson*, 3 Russ. 493, and the dates; *Tylee v. Webb*, 6 Beav. 552; *Finch v. Shaw*, 19 Beav. 500, aff'd in D. P.; [5 H. L. Cas. 905; *Story Agency* (6th ed.), § 140; 1 *Story Eq. Jur.* § 408; *Bracken v. Miller*, 4 Watts & S. 102; *Lawrence v. Tucker*, 7 Greenl. 195; *Hood v. Fahnestock*, 8 Watts, 489; *Boyd v. Vanderkemp*, 1 Barb. Ch. 287; *Bank of United States v. Davis*, 2 Hill, 451; *Winchester v. The Baltimore Railroad Co.* 4 Md. 231; *Howard Ins. Co. v. Halsey*, 4 Selden, 271; *Wilde v. Gibson*, 1 H. L. Cas. 614, 624; *Twyer v. Moore*, 13 Ir. Eq. Rep. 250; *Colyer v. Finch*, 5 H. L. Cas. 905; *McCormick v. Wheeler*, 36 Ill. 114; *Grant v. Cole*, 8 Ala. 519; *New York Central Ins. Co. v. National Protection Ins. Co.* 20 Barb. 468; *Willis v. Vallette*, 4 Met. (Ky.) 186; *Jones v. Bamford*, 21 Iowa, 217. But, in Vermont, it is settled that it is not necessary that the notice should have come to the attorney or agent in the same transaction; if the attorney or agent has the notice, though acquired

while acting in another and different transaction, the client or principal will be affected with it; the law will presume the notice was communicated to the principal or client. *Hart v. The Farmers' & Mechanics' Bank*, 33 Vt. 252; *Abell v. Howe*, 43 N. H. 403. Such substantially is now the rule in England. *Dresser v. Norwood*, 17 C. B. N. S. 466, and note at the end of that case; and, also, in the supreme court of the United States; *The Distilled Spirits*, 11 Wallace, 356, 366, 367; with the qualification that the agent is restrained by professional confidence or otherwise from communicating his knowledge to his principal. *The Distilled Spirits*, 11 Wallace, 356, 367.]

(x) 1 Kee. 159; *Lenahan v. M'Cabe*, 2 Ir. E. R. 324; *Nixon v. Hamilton*, 2 Dru. & Wal. 364; *Perkins v. Bradley*, 1 Hare, 219; *Fuller v. Bennett*, 2 Hare, 394; *Gerard v. O'Reilly*, 3 Dru. & War. 414; *Majoribanks v. Hovenden*, Dru. 11; 6 Ir. E. R. 238; *Toulmin v. Steere*, 3 Mer. 210; *Hargreaves v. Bothwell*, 1 Kee. 154; *Fenwick v. Potts*, 8 De G., M. & G. 506; [*Hart v. Farmers' & Mechanics' Bank*, 33 Vt. 252; *Blumenthal v. Brainerd*, 38 Vt. 410; *Murray v. Ballou*, 1 John. Ch. 556, 574; *Pritchill v. Sessions*, 10 Rich. Law, 293; *Williams v. Tatnall*, 29 Ill. 553 *Wiley v. Knight*, 27 Ala. 336.]

(y) 2 Hare, 404.

the fraud any more than the party upon whom the fraud was committed.(z) Where a solicitor is the mortgagor and the mortgagee has no solicitor, the former has been considered with some doubt the solicitor of the latter, but this does not extend to constructive notice so as to make the mortgagee conusant of a prior incumbrance which the mortgagor has concealed.(a) In a later case the learned V. C. observed, that he could not see the reason for concluding that because the mortgagor is a solicitor he is necessarily solicitor for the mortgagee. The mortgagee may himself be a solicitor, or a barrister, and not choose to employ any other solicitor, and it would be a hardship upon him to say that because the mortgagor is a solicitor, he is therefore to be treated as the mortgagee's solicitor,(b) and the lord chancellor on appeal expressed the same opinion.(c) Upon the question of actual notice, it must be admitted that notice to the agent or solicitor is notice to the principal:(d) of course actual notice of a charge to a man's attorney whilst acting in the transaction is notice to the principal, and it may be classed with actual notice;(e) but where the *notice to the solicitor is not of that nature there does not appear to be any sufficient reason for altering the long established classification: where it does not amount to actual notice in the course of the employment, and the client is wholly ignorant of it, yet notice may be implied in proper cases from the relation between solicitor and client.

9. A public act of parliament binds all mankind; but a private act of parliament is not, of itself, notice to a purchaser.(f)

10. *Lis pendens* is of itself notice to a purchaser,(g) unless it

(z) *Kennedy v. Green*, 3 M. & K. 699; *Atkins v. Delmege*, 12 Ir. E. R. 1; *Kendall v. Hulls*, 11 Jur. 864; *Hewitt v. Loosemore*, 9 Hare, 449; *Robinson v. Briggs*, 1 Sm. & Gif. 188; *Majoribanks v. Hovenden*, Dru. 11; *Ogilvie v. Jeaffreson*, 2 Giff. 353; [6 Jur. N. S. 970;] *Hipkins v. Amery*, 2 Giff. 292; *Willes v. Greenhill*, 29 Beav. 387; but see *Spencer v. Topham*, 22 Beav. 573, *infra*.

(a) *Hewitt v. Loosemore*, 9 Hare, 449.

(b) *Espin v. Pemberton*, 4 Drew. 333; 3 De G. & J. 547; *Perry v. Holl*, 2 De G., F. & J. 38, *inf.* pl. 38.

(c) 3 De G. & J. 554.

(d) 3 M. & K. 711.. *CR 6 ch. af 678*

(e) 3 De G. & J. 554.

(f) 2 Ves. 480; see 3 B. & P. 578.

(g) Tot. 45; *Yeaveley v. Yeaveley*, Tot. 227; 3 Ch. R. 25; *Digs v. Boys*, Tot. 254; *Culpepper v. Ashton*, 2 Ch. C. 116, 233; *Barns v. Canning*, 1 Ch. C. 300; *Sorrel v. Carpenter*, 2 P. Wms. 482; 3 P. Wms. 117; *Garth v. Ward*, 2 Atk. 174; 3 Barn. R. C. 450; *Worsley v. Ld. Scarborough*, 3 Atk. 392; *Walker v. Smallwood*, Amb. 676; 5 Co. 47, b; *Hill v. Worsley*, Hard. 320; *Goldson v. Gardiner*,

be collusive, in which case it will not bind him,^(h) but it is not of itself notice for the purpose of postponing a registered deed.⁽ⁱ⁾ A *subpæna* served, was not, however, a sufficient *lis pendens* unless a bill was filed;^(k) but when the bill was filed, the *lis pendens* began from the service of the *subpæna*.^(k¹) And the

1 Ver. 459; Bp. of Winchester v. Paine, 11 Ves. 194; Going v. Farrell, Beat. 472. [Sutherland J. in Jackson v. Andrews, 7 Wend. 152, 156; Hopkins v. M'Laren, 4 Cowen, 667; Murray v. Ballou, 1 John. Ch. 566; Heatley v. Finster, 2 John. Ch. 158; Murray v. Lylburn, 2 John. Ch. 441; Green v. Slayter, 4 John. Ch. 38; Zeiter v. Bowman, 6 Barb. 133; Stuyvesant v. Hall, 2 Barb. Ch. 151; Watlington v. Howley, 1 Desaus. 167, & note, 170; Fonbl. Eq. bk. 2, ch. 6, § 3, note (u); Moragne v. Le Roy Du Cereveil, 4 Desaus. 256; Owings v. Meyers, 3 Bibb, 279; Chandron v. Magee, 8 Ala. 570; Tongue v. Morton, 6 Harr. & J. 21; Green v. White, 7 Blackf. 242; Copenheaver v. Huffaker, 6 B. Mon. 18; Borrowscale v. Tuttle, 5 Allen, 377; Haven v. Adams, 8 Allen, 363, 366, 367; Leitch v. Wells, 48 Barb. 637; Baird v. Baird, Phill. (N. C.) Eq. 317; Edwards v. Banksmith, 35 Geo. 213; Wickliffe v. Breckenridge, 1 Bush (Ky.), 427; Parsons v. Hoyt, 24 Iowa, 154; 1 Story Eq. Jur. §§ 405-407; 1 Dan. Ch. Pr. (4th Am. ed.) 280, 281, & notes; McGregor v. McGregor, 21 Iowa, 441; Knowles v. Rablin, 20 Iowa, 101; In re Barnard's Banking Co. L. R. 2 Ch. Ap. 171; McPherson v. Housel, 2 Beasley (N. J.) 299; Scarlett v. Gorham, 28 Ill. 319; Hurlbutt v. Butenop, 27 Cal. 50; Jackson v. Warren, 32 Ill. 331; Cooley v. Brayton, 16 Iowa, 10. In Haughwout v. Murphy, 7 C. E. Green (N. J.), 531, 544, Depue J. said: "A suit in chancery duly prosecuted in good faith, and followed by a decree, is constructive notice to every person, who acquires from a defendant, *pendente lite*, an interest in the subject matter of the litigation, of the legal and equitable rights of the plaintiff as charged in the bill and established by the decree. This

effect of a successful litigation in subordinating the title of a purchaser pending a litigation, to the rights of the plaintiff as established in the suit, is not derived from legislation. It is a doctrine of courts of equity of ancient origin, and rests not upon the principles of the court with regard to notice, but on the ground that it is necessary to the administration of justice that the decision of the court in a suit should be binding, not only on the litigant parties, but also upon those who acquire title from them during the pendency of the suit. Such a purchaser need not be made a party, and will be bound by the decree which shall be made." Although the maxim is, "*pendente lite nil innovetur*," that maxim is not to be understood as warranting the conclusion that the conveyance so made is absolutely null and void at all times and for all purposes. The true interpretation of the maxim is, that the conveyance does not vary the rights of the parties in that suit; and they are not bound to take notice of the title acquired under it, but with regard to them the title is to be taken, as if it had never existed. 2 Story Eq. Jur. § 908; Murray v. Lylburn, 2 John. Ch. 444, 445; Haughwout v. Murphy, 7 C. E. Green, 531.]

(h) 2 Ch. C. 116, 223.

(i) 19 Ves. 439.

(k) Anon. 1 Ver. 318.

(k¹) [See Haughwout v. Murphy, 6 C. E. Green (N. J.), 118; S. C. 7 C. E. Green, 531; Walker v. Hill, 7 C. E. Green, 514; Butler v. Tomlinson, 38 Barb. 640; Murray v. Ballou, 1 John. Ch. 566; Chandron v. Magee, 8 Ala. 570; Miller v. Kershaw, 1 Bailey Eq. 479; Boynton v. Rawson, 1 Clarke, 584; Lyle v. Bradford, 7 Monroe, 116.]

question must relate to the estate, and not merely to money secured upon it,(l) but the case of a bill charging a particular estate with a particular trust: (m) or of a bill to perpetuate testimony and establish a will, is a sufficient *lis pendens*,(n) but the plaintiff must not be guilty of laches in the prosecution of his suit.(o)

11. Lord Redesdale appears to have held, that although a bill is dismissed, yet a party, purchasing after the dismissal, was a purchaser *pendente lite*, if an appeal was afterwards brought in the House of Lords, since it was still a question whether the bill was *rightly* dismissed, and the parties thus having notice, must take subject to all the legal and equitable consequences; but it was not necessary to decide whether such a purchase was by force of the supposed *lis pendens* made with implied notice of the adverse title; (p) it would seem to be carrying the doctrine too far. In a recent case (q) it was laid down that the doctrine of *lis pendens* does not depend upon implied or constructive trust, but upon the ground that neither party can alienate *pendente lite* so as to defeat the rights of the other party, and this view leads to important considerations.(q¹) And where a bill was dismissed

(l) *Worsley v. Ld. Scarborough*, 3 Atk. 392.

(m) *Walker v. Flamstead*, 2 Ld. Keny. 2d part, 57; *Jennings v. Bond*, 2 J. & L. 720.

(n) *Garth v. Ward*, 2 Atk. 174.

(o) *Preston v. Tubbin*, 1 Ver. 286; *Bp. of Winchester v. Paine*, 11 Ves. 194; *Kinsman v. Kinsman*, Taml. 399; *Drew v. Ld. Norbury*, 3 J. & L. 267; *Clarke v. Armstrong*, 10 Ir. Ch. Rep. 263; [*Trimble v. Boothby*, 14 Ohio, 109; *Murray v. Ballou*, 1 John. Ch. 566; *Heatley v. Finster*, 2 John. Ch. 158; *Shiveley v. Jones*, 6 B. Mon. 274; *Clarkson v. Morgan*, 6 B. Mon. 441.]

(p) 1 Atk. 89; *Gaskell v. Durdin*, 2 Bal. & Beat. 167. [See *Abadie v. Lobero*, 36 Cal. 390; *Clary v. Marshall*, 4 Dana, 95; *Clarkson v. Morgan*, 6 B. Mon. 441; *Jackson v. Warren*, 32 Ill. 331.]

(q) *Bellamy v. Sabine*, 1 De G. & J. 566.

(q¹) [*Newman v. Chapman*, 2 Rand. 93. In *Hopkins v. M'Laren*, 4 Cowen,

678, 679, it was said by Senator Colden, that "the doctrine of *lis pendens* applies only where a third person attempts to intrude into a controversy by acquiring an interest in the matter in litigation, pending the suit." He quotes, in support of this, the rule as laid down by Mr. Chancellor Kent in *Murray v. Lylburn*, 2 John. Ch. 441, and adds: "The reason of the rule is, that if a transfer of interest, pending a suit, were to be allowed to affect the proceedings, there would be no end to litigation; for as soon as a new party was brought in, he might transfer to another, and render it necessary to bring that other before the court; so that a suit might be interminable. But this reason has no application to a third person, whose interest subsisted before the suit was commenced, and who might have been made an original party." See, per Lord Justice Turner, in *Bellamy v. Sabine*, 3 Jur. N. S. 943; 1 De G. & J. 566, 578, 580, per Lord Cranworth, 584, per Lord Justice Turner. In *Parks v. Jackson*, 11 Wend. 442, the rule

with costs against the plaintiff who had a remainder in fee in the estate, and he afterwards sold his remainder to a person * who had notice, of the suit, the purchaser was compelled to pay the costs in the suit, which were treated as a charge on his estate; but this has been reversed, as the suit was at an end.(r)

12. A purchaser *pendente lite* on filing his supplemental bill, goes into the court *pro bono et malo*, and will be liable to all the costs in the proceedings, from the beginning to the end of the suit; (s) and he will not be admitted to examine the justice of a former decree, but will be bound by the prior proceedings.(t)

13. Relief being sought against a *bonâ fide* purchaser who bought *pendente lite*, without actual notice, is, however, considered a hard case in equity; and, although the court cannot refuse its aid against him, yet the plaintiff is by no means a favorite; and therefore if he make a slip in his proceedings, the court will not assist him to rectify the mistake.(u)

was held, by the court of errors in New York, not to apply to a case, where a purchaser has entered into articles of agreement for the purchase of an estate, by which articles he had a right to take possession, and under which he did take possession, and make improvements upon the premises prior to the commencement of a suit by a third person to recover the same of the vendor, although the money was paid and a deed of the premises executed during the pendency of such suit. Mr. Senator Seward, in the above case, said that he had not found, nor had there been shown to the court a single case, in which the rule *lis pendens* has been applied to a person who purchases by contract, and enters into possession, and in fact performs his contract before suit commenced, and then, *pendente lite*, without actual notice, fulfils his contract and takes a deed for the land. Mr. Chancellor Walworth dissented from the above decision. See *Jackson v. Andrews*, 7 Wend. 152, in which it was held that a purchase of land, pending a suit concerning it, is champerty, and the conveyance is absolutely void, even where the purchase is *bonâ fide*. See also *Hopkins v. M'Laren*, 4 Cowen, 667; *Tuttle v.*

Jackson, 6 Wend. 213; *Hampson v. Edelen*, 2 Harr. & J. 64; *Butts v. Chinn*, 4 J. J. Marsh. 641; *Haven v. Adams*, 8 Allen, 363. The doctrine does not apply to a case, where a person, holding an unrecorded deed of land at the time a suit in chancery, to which he is not a party, is commenced respecting the title to the same land, puts his deed on record. *Irvin v. Smith*, 17 Ohio, 226. In order to a fair application of this doctrine of *lis pendens* to any particular case, the property to be affected by it should be so pointed out by the proceedings as to warn the whole world that they meddle with it at their peril. *Lewis v. Mew*, 1 Strobb. Eq. 180; see *Green v. Slayer*, 4 John. Ch. 38; *Edwards v. Crenshaw*, 1 McCord Ch. 264; *S. C. Harper Eq.* 224; *Miller v. Sherry*, 2 Wallace (U. S.), 237.]

(r) *Nortcliffe v. Warburton*, 8 Jur. N. S. 353, 854.

(s) *Finch v. Newnham*, 2 Ver. 216; *Trevelyan v. White*, 1 Beav. 588, as to relief to one of the purchasers against co-defendants.

(t) 1 Dow, 31.

(u) *Sorrell v. Carpenter*, 2 P. Wms. 482.

14. The mere pendency of a suit will not prevent the defendant from selling the property, the subject of the suit,^(u) but the purchase will, in no manner affect the right of the plaintiff, except so far as it may be necessary to go against the purchaser, if he obtain a transfer of the *legal* estate.^(x) If, however, the plaintiff have only a defeasible estate, the defendant may exercise his right to put an end to it, notwithstanding the pendency of the suit. Therefore, if a man make a voluntary settlement, and the person claiming under it file a bill against the settlor, to have the trusts performed, yet the defendant may defeat the plaintiff's right by selling the estate to a purchaser during the pendency of the suit. The same observation applies to a settlement with a power of revocation. The settlor, the defendant, may revoke the settlement, although a suit is pending for carrying it into execution.

15. This doctrine underwent great consideration in *Bellamy v. Sabine*, where there was much conflict of opinion.^(y) To state the case shortly: John was tenant for life of one estate, with remainder to his son Edward in tail, and was seised in fee of another estate. John agreed to sell to Edward, who was to pay annuities and other charges. Edward agreed to sell to Sabine, his attorney, subject to the charges, and John and Edward suffered a recovery, and conveyed the fee of all to Sabine. Edward died, and his brother and heir Francis, who, if no recovery had been suffered, would have been tenant in tail of the settled estate, filed a bill against John and Sabine to set aside both sales for fraud. The decree set aside the sale to Sabine, but * dismissed the bill against John, and therefore did not impeach the sale by John to Edward. Sabine made several mortgages, and one to A. *after* the filing of Francis's bill, and pending the suit. John after the decree filed his bill against Francis and Sabine to have the benefit of his agreement with Edward, which was ac-

(u) [See *Camp v. Forrest*, 13 Ala. 114; 1 Story Eq. Jur. § 406.]

(x) *Metcalf v. Pulvertoft*, V. C. 10th August, 1813; 1 Ves. & Bea. 180; 2 Ves. & Bea. 200; *Landon v. Morris*, 5 Sim. 247. [See *Jackson v. Andrews*, 7 Wend. 152; *Murray v. Lylburn*, 2 John. Ch. 441, 442. The doctrine of *lis pendens* does not apply

as against a person having an equity in lands, who is not made a party to a suit, and who, pending the suit, acquires the legal title. *Trimble v. Boothby*, 14 Ohio, 109; *Gibler v. Trimble*, 14 Ohio, 323; *Parks v. Jackson*, 11 Wend. 442.]

(y) 2 Phill. 425; 3 Jur. N. S. 943, 1 De G. & J. 566.

cordingly decreed. And the question was whether A., the mortgagee, *pendente lite* was to take in priority before John in respect of his unsatisfied claims, and it was held that he was. Wood V. C. was of opinion that the doctrine of *lis pendens* is that the purchaser pending a suit is to be bound by the result of the suit just as much as if he was a party to it. And that as Sabine was bound by John's claims, the mortgagee under Sabine was equally bound. But this was reversed upon appeal. It was admitted that although A., the mortgagee, was ignorant of Francis's right to impeach the title of Sabine under Edward, yet as he took pending the suit he could only take such rights as Sabine obtained under the decree. But it was decided that Francis's suit against John and Sabine did not operate as implied notice to A. of John's equitable claims against Sabine his co-defendant. It was asked, if the decision of the V. C. was right, and an alienee of a defendant is by virtue of this doctrine of *lis pendens* to be affected by the claim of a co-defendant, upon what principle is the alienee to be protected against the claim of a mere stranger?

16. In a later case,(z) in an administration suit where the *lis pendens* was registered and a defendant mortgaged to a person who had no actual notice of the suit, the master of the rolls held that the mortgagor could only give to his mortgagee pending the suit such title as he had, and this suit being registered that he could only give a mortgage subject to the equitable rights which had been declared by the court: he held that a purchaser having notice of the suit, not actual but constructive, by its being registered as a *lis pendens*, must be taken to have notice that the court had made a decree that one defendant had a right to stand in the shoes of the other. This view is open to great difficulty, and it can hardly be reconciled with the decision upon appeal in *Bellamy v. Sabine*.(z¹)

17. Decrees of the courts of equity are not of themselves notice to a purchaser.(a) But decrees which do not put an end to the suit, as decrees to account, are of themselves notice to a pur-

(z) *Tyler v. Thomas*, 25 Beav. 47.

(z¹) [Mr. Dart notices these two cases, and remarks that there is sufficient distinction between them to justify the decision

of the master of the rolls, *Sir John Romilly*. 2 *Dart V. & P.* (4th Eng. ed.) 796-798.]

(a) *Tot.* 45; *Prac. Reg. Ch.* 125; *Sir*

chaser; (b) because the *lites pendentes* are not thereby terminated.

* 18. But now no *lis pendens* of which a purchaser has not *express* notice will bind him, unless the title of the cause with other particulars be registered. (c)

19. The docketing of judgments is not of itself notice to a purchaser, (d) for, as Lord Talbot observed, judgments are infinite. (e)

20. Nor is registration of deeds of itself notice to a purchaser who was seised of a legal estate at the time of the purchase. If a man search the register he will be deemed to have notice; (f) but if a search is made for a particular period, the purchaser will not by the search be deemed to have notice of any instrument not registered within that period. (g) Where, however, it ap-

T. Harvey v. Montague, 1 Ver. 57, 122; Worsley v. Ld. Scarborough, 3 Atk. 392; 2 P. Wms. 481; 1 Ves. 571. (1)

(b) Worsley v. Ld. Scarborough, 3 Atk. 392; Higgins v. Shaw, 2 Dru. & War. 356; Kinsman v. Kinsman, 1 Rus. & My. 617.

(c) *Sup.* ch. 22, s. 3. As to *lis pendens* in a foreign country, Wallace v. Ld. Donegal, 1 Dru. & Wal. 461; Norris v. Ld. D. Stuart, 16 Beav. 359; 5 Cl. & Fin. 666.

(d) Snelling v. Squint, 2 Ch. C. 47; Greswold v. Marsham, 2 Ch. C. 170; Amb. 154; Churchill v. Grove, 1 Ch. C. 37; 2 Free. 176; Lane v. Jackson, 20 Beav. 535.

(e) 2 Eq. Ca. Ab. 682, D. n. (b).

(f) Bushell v. Bushell, 1 Sch. & Lef. 103; Ford v. White, 16 Beav. 120.

(g) Hodgson v. Dean, 2 Sim. & Stu. 221; aff'd. by L. C., July 1825, MS. [In the United States the doctrine has been differently settled; and it is uniformly held that the registration of a conveyance duly executed operates as constructive no-

tice to all subsequent purchasers, claiming under the same grantor of any estate, legal or equitable, in the same property. The conveyance must be one which the law requires or authorizes to be registered. 1 Story Eq. Jur. §§ 403, 404; 4 Kent (11th ed.), 174; Tilton v. Hunter, 29 Maine, 29, 35; Bates v. Norcross, 14 Pick. 224, 231; George v. Wood, 9 Allen, 80; Tyler v. Hammond, 11 Pick. 193, 216; Shultz v. Moore, 1 McLean, 520; ante, 728, & notes; Stuyvesant v. Hall, 2 Barb. 151; Schutt v. Large, 6 Barb. 373; Crockett v. McGuire, 10 Missou. 34; Clamorgan v. Lane, 9 Missou. 446; Spofford v. Weston, 29 Maine, 140, 145; Shaw v. Poor, 6 Pick. 86; Parkist v. Alexander, 1 John. Ch. 394; Johnson v. Stagg, 2 John. 510; Evans v. Jones, 1 Yeates, 172; Heister v. Fortner, 2 Binn. 40; Frost v. Beekman, 1 John. Ch. 300; Peters v. Goodrich, 3 Conn. 146; Hughes v. Edwards, 9 Wheat. 489; Thayer v. Kramer, 1 McCord, 365; Lasselle v. Barnett, 1 Blackf. 150; 2 Cruise Dig. by Mr. Greenleaf, vol. 4, tit.

(1) Lord Hardwicke said there was no such doctrine that men were to take notice of the decrees of this court, though they were to take notice of a *lis pendens*; Cox's MS. note to Preston v. Tubbin, 1 Ver. in Linc. Inn Library. [See Turner v. Crebill, 1 Ham. (Ohio) 374. But see Monell v. Lawrence, 12 John. 521; Watlington v. Howley, 1 Desaus. 170.

peared that search had been made by the attorney's clerks, but it did not appear whether any communication in regard to the search had been made to the attorney, it was considered sufficient to bind the purchaser, as in fact there was a judgment and search was made, and it mattered not whether the clerks reported that there was or was not a judgment.(h) Although notice has been admitted to bind a purchaser by an unregistered deed, yet this has been regretted, and Lord Hardwicke in *Hine v. Dodd*,

32, ch. 29, § 20, in note; *Cooke v. Kell*, 13 Md. 469; *Bell v. Blaney*, 2 Murph. 171; *Cain v. Jones*, 5 Yerger, 249; *Bank of Alexandria v. Patton*, 1 Rob. 499; *M'Neely v. Rucker*, 6 Blackf. 391; *Tripe v. Marcy*, 39 N. H. 439; *Stevens v. Morse*, 47 N. H. 532, 533, 534; *Vansant v. Davies*, 6 Ohio N. S. 52; *Loscy v. Simpson*, 3 Stockt. (N. J.) 246; *Barney v. Little*, 15 Iowa, 527; *Long v. Dollarhide*, 24 Cal. 218. A party claiming through a person whose deed is so on record, is taken to have had all the knowledge which is conveyed by the language of that deed. *Chapman J. in Bancroft v. Consen*, 13 Allen, 51. The registry of a mortgage is notice only to the extent of the sum specified in the registry; as, where a mortgage was given for three thousand dollars, and by mistake of the clerk was registered for three hundred dollars, the subsequent *bonâ fide* holder with no other notice but the register, was held bound only to the extent set forth in the record. *Frost v. Beekman*, 1 John. Ch. 288. In most of the States the record operates as constructive notice from the time it is made, however long it may be after the execution and delivery of the deed; *Irvin v. Smith*, 17 Ohio, 226; although the law may prescribe a particular period within which deeds are to be recorded. *Ante*, 727, note. The registry of a deed, not executed or acknowledged as the law prescribes, or which the law does not require or authorize, is not even constructive notice to third persons. *Blood v. Blood*, 23 Pick. 80; *De Witt v. Moulton*, 17 Maine, 418; *McNeil v. Magee*, 5 Mason, 244; *Sigourney v. Larned*, 10 Pick. 72;

Shultz v. Moore, 1 McLean, 520; 4 Kent (11th ed.), 174; *Kerns v. Swope*, 2 Watts, 418; *Cheney v. Watkins*, 1 Harr. & J. 527; *Heister v. Fortner*, 2 Binn. 40; *Tillman v. Cowand*, 12 Sm. & M. 262; *Hodgson v. Butts*, 3 Cranch, 155; *Simon v. Brown*, 3 Yeates, 187; *Villard v. Robert*, 1 Strobb. Eq. 393; *Commonwealth v. Rodes*, 6 B. Mon. 171; *Gould v. Woodward*, 4 Greene (Iowa), 82; *Cockey v. Milne*, 16 Md. 200; *Minor v. Willoughby*, 3 Minn. 225. The registration of a deed defectively executed is not notice; *Troup v. Haight*, 1 Hopk. 61; *Frost v. Beekman*, 1 John. Ch. 300; *Carter v. Champion*, 8 Conn. 549; *Isham v. Bennington Iron Company*, 19 Vt. 230; but a subsequent mortgagee cannot have priority over a prior mortgage, of which he had notice, because it was recorded upon an insufficient authentication. *Underwood v. Ogden*, 6 B. Mon. 606. In Illinois, deeds recorded are made notice to creditors and subsequent purchasers, though not properly acknowledged. *Gillespie v. Reed*, 3 McLean, 377. A deed was duly executed and recorded by the grantor, but not delivered to the grantee until after a subsequent mortgage of the same estate to a third party had been executed and recorded; the grantee afterwards assented to and ratified the grantor's act in having the deed recorded, but it was held that this could not give his deed precedence of the mortgage, the latter having been so recorded before such assent and ratification. *Parmelee v. Simpson*, 5 Wallace (U. S.), 81.]

(h) *Procter v. Cooper*, 2 Drew. 1, 2 Eq. Rep. 365; see the judgments.

said that nothing short of actual fraud would do, and Lord Alvanley at the rolls said he was very glad to find that Lord Hardwicke had said so,⁽ⁱ⁾ and he himself in deciding *Jolland v. Stainbridge*,^(k) laid it down that, although it must be admitted that the registry is not conclusive evidence, it was equally clear that it must be satisfactorily proved that the person who registers the subsequent deed must have known exactly the situation of the persons having the prior deed, and knowing that, registered in order to defraud them of that title he knew at the time was in them. In *Benham v. Keane*,^(l) Lord Justice Turner observed that looking, not merely to the case of *Le Neve v. Le Neve*, but to the authorities referred to in it, and to the case of *Davis v. Strathmore*, as to which, having regard to what had been decided, it could not, he thought, be doubted what the opinion of Lord Eldon was, and looking also to the cases of *Tunstall v. Trappes* and *Robinson v. Woodward*, he should hesitate very long before venturing to intimate any doubt upon the point whether purchasers or mortgagees of lands in Middlesex are or are not bound by notice of an unregistered judgment, but he did not think it necessary for them to decide the question.

* 21. Neither an act of bankruptcy (*m*) nor a commission of bankruptcy (*n*) is notice to a purchaser. And now, as we have seen, a *bonâ fide* purchaser without notice will not be affected by a secret act of bankruptcy before his purchase, although it is followed up by an adjudication after his purchase.^(o) Publication in the Gazette of an insolvency is not notice,^(p) nor is insolvency notice to a purchaser of an equitable interest, who gave notice to the trustees, who had no notice of the insolvency; (*q*)

(i) 3 Ves. 486.

(k) *Ib.* 485.

(l) 8 Jur. N. S. 605, 606.

(m) *Wilker v. Bodington*, 2 Ver. 599; *Anon.* 2 Ch. C. 136; *Cullet v. De Gols*, For. 65; 4 Bur. 2425; *Ex parte Knott*, 11 Ves. 609.

(n) *Hithcox v. Sedgwick*, 2 Ver. 156; reversed in D. P. Journ. H. of L. vol. xiv. p. 601; 7 East, 161; *Sowerby v. Brooks*, 4 B. & Ald. 523, where the court was not aware of the reversal in D. P. of *Hithcox v. Sedgwick*; 3 M. & K. 591;

Ex parte Herbert, 13 Ves. 183, which *qu.*; *In re Barr's Trust*, 4 K. & J. 219.

(o) *Sup.* c. 22, s. 3.

(p) *In re Atkinson's Estate*, 4 De G. & Sm. 548; 3 De G., M. & G. 140.

(q) [*In re Atkinson's Estate*, 4 De G. & Sm. 548; 3 De G., M. & G. 140. The trustee of a fund saw in a newspaper the notice of a petition to the insolvent debtor's court, presented by his *cestui que trust*, and acted on the information so acquired, and it was held under the circumstances, that a subsequent assignee of the *cestui*

and assignees of bankrupts stand upon the same footing with assignees of insolvents, they both must give notice like a particular assignee.(r)

22. What is sufficient to put a purchaser upon an inquiry is good notice; (s) that is, where a man has sufficient information to lead him to a fact, he shall be deemed conusant of it. Therefore if a man knows that the legal estate is in a third person at the time he purchases, he is bound to take notice what the trust is.(t) So notice that the title deeds are in another man's posses-

que trust, who had given to the trustee formal notice of the assignment, did not thereby acquire priority over the assignee in insolvency. *Lloyd v. Banks*, L. R. 3 Ch. Ap. 488.]

(r) *In re Barr's Trusts*, 4 K. & J. 219.

(s) *Smith v. Lowe*, 1 Atk. 489; *Taylor v. Baker*, Dan. 71; *Webb v. Lugar*, 2 Y. & C. 247; *supra*, pl. 3; [*Bancroft v. Consen*, 13 Allen, 50, 51; *Hankinson v. Barbour*, 29 Ill. 80; *Wetherel v. Boon*, 17 Texas, 143; *Morland v. Cook*, L. R. 6 Eq. 252, 267; *Warren v. Sweet*, 31 N. H. 332, 341, 342; *Hull v. Noble*, 40 Maine, 480, 481; *Baker v. Bliss*, 39 N. Y. 70; *Green v. Slayter*, 4 John. Ch. 46; *Sterry v. Arden*, 1 John. Ch. 267; *Peters v. Goodrich*, 3 Conn. 146; *Pitney v. Leonard*, 1 Paige, 462; 1 Story Eq. Jur. § 400; *Fonbl. Eq. bk. 2*, ch. 6, § 3, note (m); *Wilson v. Hill*, 2 Beasley (N. J.), 143; *Blaisdell v. Stevens*, 16 Vt. 179; *Williams v. Fullerton*, 20 Vt. 346; *Stone v. Smoot*, 39 Ill. 409; *Hatch v. Bigelow*, 39 Ill. 546; *Powell v. Healey*, 28 Texas, 52; *Hines v. Perry*, 25 Texas, 443; *Pingree v. Coffin*, 12 Gray, 288; *Smoot v. Rea*, 19 Md. 398. Generally speaking, a purchaser or mortgagee is bound to inquire into the title of his vendor or mortgagor, and will be affected with notice of what appears upon the title, if he does not so inquire; and the rule seems to apply as well to leasehold estates as to freehold estates; and equally to a tenant for years as a tenant from year to year. *Wilson v. Hart*, L. R. 1 Ch. Ap. 463; *Burrus v. Roulhac*, 2 Bush (Ky.), 39. But the

policy of the United States registry laws seems to require more notice of an unregistered deed than that which is barely sufficient to put a party on inquiry. Suspicion of notice is not enough; 4 Kent (11th ed.), 171, 172; *Penny v. Watts*, 1 Mac. & G. (Am. ed.) 150, note (2); *Fort v. Burch*, 6 Barb. 60; *Tuttle v. Jackson*, 6 Wend. 226; *Jackson v. Van Valkenburgh*, 8 Cowen, 260; *Jackson v. Given*, 8 John. 137; *Mundy v. Vawter*, 3 Grattan, 518; *Doe v. Reed*, 4 Scam. 117. Where actual notice of a prior unrecorded conveyance is required, the party upon whom it is to be proved is not bound to inquire at all; *Pomroy v. Stevens*, 11 Met. 244; *Curtis v. Mundy*, 3 Met. 405; *Parker v. Osgood*, 3 Allen, 487; *Spofford v. Weston*, 29 Maine, 140; *Nantz v. M'Pherson*, 7 Monroe, 599; *Peters v. Goodrich*, 3 Conn. 146; 4 Kent (11th ed.), 171, 172, 179; *Rogers v. Jones*, 8 N. H. 268, 269; *Green v. Slayter*, 4 John. Ch. 46; *Dexter v. Harris*, 2 Mason, 536; *Doe v. Reed*, 4 Scam. 117; *Jackson v. Van Valkenburgh*, 8 Cowen, 260; but notice, such as men commonly act upon in the ordinary affairs of life, is sufficient; *Curtis v. Mundy*, 3 Met. 405; *Wilcox v. Hill*, 11 Mich. 256; *ante*, 728, note.]

(t) *Anon.* 2 Free. 137, pl. 711. [A purchaser for value without notice of a previous incumbrance cannot protect himself by a legal estate obtained under circumstances which, if disclosed to him, would have affected him with notice that the conveyance of the legal estate was a breach of trust. *Joyce v. Rawlins*, *Pilcher v. Raw.*

sion may be held to be notice of any equitable claim which he may have on the estate, and as a security for which he held the deeds.(u)

23. So if a purchaser, with knowledge of the relation, buy from an agent, who bought from his principal, he may have to defend the purchase just as if he were himself the agent.(x)

24. A notice that part of the estate is in possession of a tenant is notice of a lease,(y) or that it is in possession of a person named and his undertenants.(z) And if the tenant has even changed his character by having agreed to purchase the estate, his possession amounts to notice of his equitable title as purchaser.(a) Notice that the seller's title is under a lease, is of

lins, 19 W. R. 217, R.; see *Mitchell v. Peters*, 18 Iowa, 119.]

(u) *Hiern v. Mill*, 13 Ves. 114; 1 Hare, 61, *post*; *Reddy v. Williams*, 3 J. & L. 1; *Spinner v. Walsh*, 11 Ir. E. R. 597. [See *Berry v. Mut. Ins. Co.* 2 John. Ch. 603; *Johnson v. Stagg*, 2 John. 510.

(x) *Molony v. Kernan*, 2 Dru. & War. 31.

(y) 2 Ves. jr. 440; 13 Ves. 121; [*McCall v. Yard*, 3 Stockt. (N. J.) 58; *McKee v. Wilcox*, 11 Mich. 358; *Brown v. Gaffney*, 28 Ill. 149; *Stewart v. McSweeney*, 14 Wis. 468; *James v. Lichfield*, L. R. 9 Eq. 51; 39 L. J. Ch. 248; *Hull v. Noble*, 40 Maine, 480, 481; *Dickey v. Lyon*, 19 Iowa, 544.]

(z) *Bailey v. Richardson*, 9 Hare, 734; explained 9 Moo. P. C. 33.

(a) *Daniels v. Davison*, 16 Ves. 249; *Crofton v. Ormsby*, 2 Sch. & Lef. 583; *Meux v. Maltby*, 2 Swan. 181; *Powell v. Dillon*, 2 Bal. & Beat. 416; *Jones v. Smith*, 1 Hare, 43; 17 Ves. 433; *Allen v. Anthony*, 1 Mer. 282; *Penny v. Watts*, 1 M. & G. 150; 2 De G. & Sm. 501, on appeal, which consider; *Wilbraham v. Livesey*, 18 Beav. 206. [See 4 Kent (11th ed.), 179; 1 Story Eq. Jur. § 400; *Kerr F. & M.* (1st Am. ed.) 244 *et seq.*; *Chesterman v. Gardner*, 5 John. Ch. 29; *McCaskle v. Amarine*, 12 Ala. 17; *Dixon v. Doe*, 1 Sm. & M. 70; *Rogers v. Jones*, 8 N. H. 270; *M'Mechan v. Griffing*, 3 Pick. 149, 156; *Boone v. Chiles*, 10 Peters (U. S.), 223,

224; *Crews v. Burcham*, 1 Black (U. S.), 352; *Glidewell v. Spaugh*, 26 Ind. 319; *Aldrich v. Aldrich*, 37 Ill. 32; *Woodward v. Clark*, 15 Mich. 104; *Truesdale v. Ford*, 37 Ill. 210; *Farmers' & C. Bank v. Bronson*, 14 Mich. 361; *Nelson v. Wade*, 21 Iowa, 49; *Hubbard v. Long*, 20 Iowa, 149; *Fair v. Stevenot*, 29 Cal. 486; *McKinzie v. Perrill*, 15 Ohio St. 162; *Harris v. Carter*, 3 Stew. 233; *Smith v. Yule*, 31 Cal. 180; *Hughes v. United States*, 4 Wallace, 232; *Buckingham v. Smith*, 10 Ohio, 288; *Ely v. Wilcox*, 20 Wis. 523; *Sears v. Munson*, 23 Iowa, 380; *Webster v. Maddox*, 6 Greenl. 256; *Hawley v. Bullock*, 29 Texas, 216; *Blankenship v. Douglas*, 26 Texas, 225; *Grimstone v. Carter*, 3 Paige, 421; *Gouverneur v. Lynch*, 2 Paige, 300; *Moreland v. Lemaster*, 4 Blackf. 383; *Johnston v. Glancey*, 4 Blackf. 94; *Brown v. Anderson*, 1 Monroe, 201; *Phillips v. Costley*, 40 Ala. 486; *Dutton v. Warschauer*, 21 Cal. 609; *Penny v. Watts*, 1 Mac. & G. (Am. ed.) 165, note (2); *Sanders v. Bolton*, 26 Cal. 393; *Bayard v. Norris*, 5 Gill, 468; *Leach v. Ansbacher*, 55 Penn. St. 85; *Burt v. Cassery*, 12 Ala. 734; *Patton v. Hollidaysburg*, 40 Penn. St. 206; *Hardy v. Summers*, 10 G. & J. 316; *Hanly v. Morse*, 32 Maine, 287; *Landes v. Brant*, 10 How. (U. S.) 375; *Keys v. Test*, 33 Ill. 316; *Wilty v. Hightower*, 6 Sm. & M. 345; *Jenkins v. Bodley*, 1 Sm. & M. Ch. 338;

course notice that he can only sell subject to the conditions of the lease. (b) To what extent such * a purchaser would be bound

Smith v. Shane, 1 McLean, 22; Diehl v. Page, 2 Green Ch. (N. J.) 143; Baldwin v. Johnson, Saxton (N. J.), 441; Lea v. Polk Co. Copper Co. 21 How. (U. S.) 499; Havens v. Dale, 18 Cal. 359; Lestrade v. Barth, 19 Cal. 660; Suiter v. Turner, 10 Iowa, 517; Morrison v. March, 4 Minn. 422. Possession is notice only of the legal or equitable interest which the possessor claims. Losey v. Simpson, 3 Stockt. (N. J.) 246. In Pritchard v. Brown, 4 N. H. 397, 404, 405, it was held that any person who buys land, while there is a *cestui que trust* in possession, will be presumed to have had notice of the trust. And Richardson C. J. in this case, said: "We consider it perfectly well settled, that open exclusive possession is sufficient notice to all the world of any claim which he, who is so in possession, has upon the land. It is not to be supposed that any man, who wishes to purchase land honestly, will buy it without knowing what are the claims of a person who is in the open possession of it. It is reasonable, if men will buy in such cases without inquiry, that they should be presumed to have known everything, which they might have learned upon due inquiry." See supplement, 3 Mass. 579, 580; Norcross v. Widgey, 2 Mass. (Rand's ed.) 508, and cases cited in note (a); Farnsworth v. Childs, 4 Mass. 637, 639; Priest v. Rice, 1 Pick. 168; Colby v. Kenniston, 4 N. H. 266; Webster v. Maddox, 6 Greenl. 256; Matthews v. Demerritt, 22 Maine, 312; Emmons v. Murray, 16 N. H. 385. But the presumption of notice arising from possession may be rebutted. Rogers v. Jones, 8 N. H. 264; Cook v. Travis, 22 Barb. 338; Faust v. Smith, 23 N. Y. 252; Harris v. Arnold, 1 R. I. 126; Vaughan v. Tracey, 22 Missou. 415; Hewes v. Wiswell, 8 Greenl. 94; Emmons v. Murray, 16 N. H. 385. "It may well be doubted," said Parker J. in Rogers v. Jones, 8 N. H. 271, "whether

possession can be regarded as furnishing notice of a title acquired after the possession commenced, unless it be coupled with undoubted acts of ownership, such as the erection of buildings, etc." In M'Mechan v. Griffing, 3 Pick. 149, it was held that an inference of notice cannot in all cases be drawn from an open, peaceable, and exclusive possession. See Pomroy v. Stevens, 11 Met. 247, Wilde J. But to have that effect, the evidence regarding the possession must be such as to render the inference not merely probable, but necessary and unquestionable. M'Mechan v. Griffing, *ubi supra*; Newhall v. Pierce, 5 Pick. 450; Hewes v. Wiswell, 8 Greenl. 98, 99; Boynton v. Rees, 8 Pick. 329; Lawrence v. Tucker, 7 Greenl. 200; see Kendall v. Lawrence, 22 Pick. 540; Spofford v. Manning, 6 Paige, 383; Billington v. Welsh, 5 Binn. 135. In Hewes v. Wiswell, 8 Greenl. 94, it was held that an entry under a deed not recorded, followed by continual visible occupancy, is only implied notice of a change of property; but is not equivalent to the registry of the deed. 2 Cruise Dig. by Mr. Greenl. vol. 4, tit. 32, ch. 29, § 20, in note; but see Beal v. Gordon, 55 Maine, 482; Hanly v. Morse, 32 Maine, 287. Mr. Chancellor Kent, in note (d) to 4 Kent (11th ed.), 179, says: "Our registry acts are designed to protect purchasers against latent equities; the doctrine in the English law of constructive notice of the title of the lessee, or party in the possession, is not favored in the American courts;" and he cites the above cases of M'Mechan v. Griffing, and Hewes v. Wiswell, and also Flagg v. Mann, 2 Sumner, 491, 556, 557; and Scott v. Gallagher, 14 Serg. & R. 333. In Flagg v. Mann,

(b) See Lewis v. Bond, 18 Beav. 85; Wilbraham v. Livesey, *ib.* 206; [Hull v. Noble, 40 Maine, 459, 480, 481; Chesterman v. Gardner, 5 John Ch. 29; 1 Story, Eq. Jur. § 400.]

to accept the title we have already considered. Notice of what was termed a rentcharge, which had long been paid, but which

2 Sumner, 491, 555, 556, Mr. Justice Story, said: "The American courts seem indisposed to give effect to this doctrine of constructive notice from possession, even in its most limited form;" and having cited and commented on some of the above cases, the learned judge adds: "These cases do, as I think, admonish courts of equity in this country, where the registration of deeds, as matters of title, is universally provided for, not to enlarge the doctrine of constructive notice, or to follow all the English cases on this subject, except with a cautious attention to their just application to the circumstances of our country, and to the structure of our laws." See *McCaskle v. Amarine*, 12 Ala. 17; *Popham v. Baldwin*, 4 Jones, 320; *Dey v. Dunham*, 2 John. Ch. 190, 191. In *Matthews v. Demerritt*, 22 Maine, 312, 315, the court reassert what is said to have long been the settled construction of the statutes requiring the registry of conveyances, *i. e.* that the visible possession of an improved estate by a grantee under his deed is implied notice of the sale to subsequent purchasers, although his deed has not been recorded. "It is," say the court, "contended for the demandant, that this rule does not apply to a case where there was no visible change at the time of the conveyance. And this position finds some support in the language of decided cases." After noticing and commenting upon the cases of *M'Mechan v. Griffin*, and *Hewes v. Wiswell*, *ubi supra*, Shepley J. adds: "One important evidence of title to an improved estate is the possession of it. And when one person purchases of another who is not in possession, he is put upon inquiry into the cause of such apparent defect of perfect title. And the law will not suppose him to be so inattentive to his interest as to neglect to make full inquiry into the cause of it. When another is in the visible possession, if he should without inquiry interfere and inter-

rupt that possession by a purchase of the estate, it would afford presumption of a fraudulent intention. And it is upon this principle of an interference with the visible rights of others, and not upon a change of possession, that the presumption of law arises, that the second purchaser conducts fraudulently toward the first when he is in possession at the time of the second purchase." 22 Maine, 316. It is admitted in the case that this presumption may be repelled by counter evidence. In *Butler v. Stevens*, 26 Maine, 484, 490, which was decided after the statutes of Maine required "*actual notice*," the same court, by Whitman C. J. said: "If there be such a change in the possession of real estate, if the one leaves it, and another takes actual possession and occupies it exclusively, in pursuance of a conveyance thereof in fee, though unrecorded, a conveyance to a third person by the same grantor will be inoperative against the former deed." This, however, was not any necessary part of the decision in that case. See *Spofford v. Weston*, 29 Maine, 140; *Hull v. Noble*, 40 Maine, 480, 481; *Beal v. Gordon*, 55 Maine, 482; *Hanley v. Morse*, 32 Maine, 287; *Clark v. Bosworth*, 51 Maine, 528. But in Massachusetts, under the statute providing that unrecorded conveyances shall not be effectual, except against the grantor, etc., "and persons having actual notice thereof," evidence of open occupation, possession, and cultivation of land, and fencing it, by a party who has an unrecorded deed thereof, is not sufficient to warrant the inference that a third person had any notice of such deed. *Pomroy v. Stevens*, 11 Met. 244, 247, 248. In *Glass v. Hulbert*, 102 Mass. 34, Mr. Justice Wells said: "In this commonwealth, the possession of land by a purchaser is not even notice to a third party of an unrecorded deed." The same doctrine is uniformly asserted and maintained in this State. *Parker v. Osgood*, 3 Allen, 490;

the receipts in the seller's possession would have shown was a simple rent, was held to bind a purchaser,^(c) but this was reversed, as the purchaser was justified in resting upon the general statement.^(d)

25. In *Hall v. Smith*, where the suit was for specific performance, there was nothing unusual in the covenants having regard to the nature of the property; but Sir W. Grant said, if the circumstance that the land was in lease had been concealed, that would be a different consideration,^(d¹) but upon analogy to other cases, if the party has notice that the estate is in lease, he has notice of everything contained in the lease; if, for instance, there is a covenant to renew, the purchaser cannot object that he had no notice of that particular covenant.^(d²) That was, he said, determined by Lord Rosslyn.^(e) It should, however, be borne

Dooley v. Wolcott, 4 Allen, 409, 410; *Mara v. Pierce*, 9 Gray, 307; *Sibley v. Leffingwell*, 8 Allen, 584. A similar provision was adopted in Maine by the revised statutes of 1841, c. 91, s. 26. Referring to this provision, Wells J. in *Hanley v. Morse*, 32 Maine, 289, remarked that it "introduced a new principle, and abolished the constructive notice arising from possession under a deed not recorded, and required actual notice of such deed to a subsequent purchaser, to prevent him from holding the estate." But in this case it was held, that the former rule of constructive notice arising from visible possession is still in force as to deeds made prior to the revised statutes of 1841, even against conveyances made since those statutes went into effect; so also, in *Clark v. Bosworth*, 51 Maine, 528, and in *Beal v. Gordon*, 55 Maine, 482; see *ante*, 728, note. But evidence of open occupation, possession, and cultivation of land by one who has an unrecorded deed thereof, though not sufficient to warrant the inference that a third person has actual notice of such deed, is competent for the consideration of the jury, in connection with direct evidence that he had such actual notice. *Sibley v. Leffingwell*, 8 Allen, 584; *Mara v. Pierce*, 9 Gray, 307.]

(c) *Att. Gen. v. Stephens*, 1 K. & J. 724;

see *Evans v. Robins*, 8 Jur. N. S. 846, just published, to which a reference should be made in ch. 1, s. 2, *supra*.

(d) 6 De G., M. & G. 111, p. 147.

(d¹) [See *ante*, 7, note (c).]

(d²) [The owner of a freehold house had entered into a covenant with the plaintiff, who was a previous owner, that the building should not be used as a beer-shop. The house was afterwards let to the defendant as tenant from year to year, without express notice of the covenant. The defendant was held to be bound by it in equity. *Wilson v. Hart*, L. R. 1 Ch. Ap. 463. A lessee is bound to inquire into, and is fixed with notice of, all covenants into which his lessor has entered in respect of the land, although he has no actual knowledge thereof. *Feilden v. Slater*, L. R. 7 Eq. 523. If a man will take an underlease he must be bound by all the covenants in the original lease. If it were not so, any tenant from year to year might do as he pleased with the property. Whatever might be the covenants in the original lease, he might say he knew nothing of them, and then would be held not bound by the covenant, and might so set the original lessor at defiance. *Feilden v. Slater*, L. R. 7 Eq. 530, *James V. C.*; *Wilson v. Hart*, L. R. 1 Ch. Ap. 463.]

(e) *Taylor v. Stibbert*, 2 Ves. jr. 437.

in mind, that Lord Rosslyn's decision was in a suit by the tenant for a specific performance of the covenant in the lease to renew, *after* the purchaser with notice of the lease, and indeed of the covenant, had completed his purchase. If it were stated generally that the property was in lease for a given term, and the seller were silent as to a covenant for renewal, it seems clear that he could not enforce a specific performance against a purchaser buying in ignorance of the covenant.(f) In a case before a single judge in the exchequer, upon a sale by the court, where leasehold property was incorrectly stated in the particulars of sale to be held at a given rent, and there were in the lease stipulations of importance in regard to the rent, and underleases, and assignments, as to which the particulars were silent, *Hall v. Smith* was treated as an authority, but as there was the usual compensation clause in case of error, the variations were considered as fairly the subject of compensation under that clause.(g) And in a case in Ireland upon a sale before the master, where the rental described the denominations to be sold, the number of acres, the annual rent, the tenants' names, the rent days, the dates of the lease and the tenure, but it did not set out or refer to the provisions of the lease; by the lease the tenant had power to fell the timber, but not so as to injure the future bearing of the old stools, and the tenant was to plant in open places oak, &c., and leave the stools of all planted by him; it was held that this case fell within the rule, and that the purchaser having implied notice of all the contents of the lease, could not object to complete, although the tenant was cutting the timber. This carries the rule a long way even in * Ireland, where the power to cut timber may be incident to the relation of landlord and tenant.(h) And in another case in Ireland, upon a sale by the court,(i) where in the rental it was stated that the estate was held under a bishop's lease for twenty-one years, subject to an annual rentcharge to a person named of 100*l.*, the purchaser was held to have constructive notice of the instrument by which the rentcharge was

(f) *Martin v. Cotter*, 3 J. & L. 506; (i) *Vaughan v. Magill*, 12 Ir. E. R. 1 Ir. C. R. 545. 200, 207; see *In re Irwin's estate*, 5 Ir.

(g) *Pope v. Garland*, 4 Y. & C. 394. Ch. R. 290, where little weight was given

(h) *Vignolles v. Bowen*, 12 Ir. E. R. to an important misstatement.

granted, although the nature of the security (a sublease with a *toties quoties* covenant for renewal) would prevent him from distraining or bringing an ejectment. And he was held equally bound by a non-alienation clause in the lease from the see, although not mentioned in the particulars, but it was not necessary to decide the latter point, as the purchaser had express notice of the clause before he purchased. But in a case in England, a clause against alienation without the lessor's consent was held to be no objection in a lease of a house, at least in or near to London.^(k) And where the conditions upon a sale by auction were silent as to the nature of the covenants, and required that the purchaser should covenant with the vendor for the performance of the covenants and conditions in the lease, a covenant in the lease against carrying on certain specified trades, "or any other noisome or offensive trade," was held to be no objection to the title.^(l) Where the agreement was to grant a lease *under a power* with (amongst other covenants) a covenant by the lessor for quiet enjoyment, and not to let any of the land near the place for the making or burning bricks, the lease to be in the form of one which might be seen in the office of the solicitor, and in this form the covenant was confined to the life of the lessor, restraining him from letting the adjoining land for burning of bricks; it turned out that he was only tenant for life of the adjoining land, and Wigram V. C. thought that an objection to the title to the property actually agreed to be demised, and that the reference to the form of the lease was to bind the lessee to the real nature of the title, which had not been disclosed; ^(m) but upon appeal Lord Cottenham reversed the decree, and held that as the agreement stated that the lease was to be under a power, and referred to the form, which showed that the covenant was to be only for the life of the party, it was the fault of the party who did not choose to inquire. There was no misrepresentation. It was not to be a covenant that no bricks should be burned on the premises.⁽ⁿ⁾ The cases appear to have gone too far,^(o) and, particularly as regards sales by auction, are calculated

(k) *Strangways v. Bishop*, 29 L. T. 120.

(l) *Grosvenor v. Green*, 28 L. J. N. S. 173. (n) *Ib.* 709; *Stuart v. Marq. of Conyngham*, 1 Ch. R. 545; *Darlington v. Hamilton*, 1 Kay, 551.

(m) *Dawes v. Betts*, 12 Jur. 412.

(o) *Martin v. Cotter*, 3 J. & L. 506.

to damage sales; for a prudent purchaser * would not bid for an estate let on lease, or held under a lease, without a full knowledge of the contents of the lease.

26. But a purchaser, where the possession is vacant, is not bound to inquire of the late occupier what was the nature of his title, although the purchaser bought the property as "late the residence of A."(*p*) Nor is he bound to pursue his inquiries through every derivative lessee, until he arrives at the person entitled to the original lease.(*q*) This will be further explained.

27. And a lessee entitled to a lien as the seller of the estate, cannot bind a purchaser as having constructive notice of his lien, from his being in possession of the estate to the knowledge of the purchaser if he has by the conveyance acknowledged the receipt of the money, for that would prevent the necessity of further inquiry.(*r*)

28. In *Hervey v. Smith*,(*s*) V. C. Wood observed that the question of notice concerning the right to an easement, is like those cases in which notice of possession by a tenant of land is notice of the terms of his holding. In such a case the question is, whether the purchaser with the benefit of the easement, had not such notice of the right of the other party as to put him upon inquiry, and whether he was not therefore affected by all the equities which affected his vendor.(*s*¹) But the point was not decided. It afterwards came before the master of the rolls. It was not the case of an easement like a right of way, but of the right to use two flues or chimneys in a wall belonging to the adjoining house, which had been paid for and had been enjoyed, but no grant was made. The purchaser of the house to which the wall belonged had no notice of the two flues having been used; but as his house had twelve flues in it, and there were fourteen chimneys in the wall, he was held to be bound. He was bound to see that he had only twelve out of the fourteen flues, and it followed that two must have been used by the adjoining neighbor:

(*p*) *Miles v. Langley*, 1 Rus. & My. 39; 2 Rus. & My. 626.

(*q*) 2 My. & Ke. 633; 1 Hare, 62; see *Penny v. Watts*, 1 Mac. & G. 150; 2 De G. & Sm. 501; [*Flagg v. Mann*, 2 Sumner, 491, 555; *Hardy v. Summers*, 10 Gill & J. 317.]

(*r*) *White v. Wakefield*, 7 Sim. 401.

(*s*) 1 K. & J. 389.

(*s*¹) [To the grantees of land overflowed by a mill-dam, the existing condition of things is notice of the equity. *Snowden v. Wilas*, 19 Ind. 10.]

he might not have thought fit to count them, or look at them, but he was put upon inquiry.^(t) This seems to carry constructive notice beyond its proper limits. More chimney-pots than flues are frequently placed on a house for the sake of uniformity. This rule requires a purchaser of a house to look upwards as well as "about him" before he completes his purchase. Where a man sold as if he were tenant in fee in possession, although he knew his mother had a life estate, and she was in possession with him, it was held that this possession was not implied notice of her estate as between the seller and the purchaser, whatever might be its operation between her and the purchaser.^(u)

* 29. Where a man had made an equitable mortgage to A., and upon afterwards giving a security to another person, stated that he had given a judgment or warrant of attorney to A. for money borrowed of him, this was held to be notice of the mortgage.^(x) This, although an incorrect statement, was notice of the incumbrance. But this has been carried much further, for where a man who claimed under a marriage settlement as a purchaser without notice, had notice previous to his marriage that a legatee had given up her legacy under a will in favor of the intended wife, to whom the estate upon which it was charged belonged, and which was comprised in the subsequent marriage settlement, and had also notice that the intended wife had in consequence devised to the legatee a portion of the estate, and that the legatee was dead, this was held by Lord Cottenham, overruling a decision of V. C. Knight Bruce, to be notice, as leading to inquiry, of an equitable reversionary title in the husband of the legatee under a subsequent agreement with the lady, the deviser, before her marriage, to convey the devised estate to him.^(y) This seems to carry the principle too far, and certainly justifies the observation of the V. C., after the reversal, that the case appeared to him one of the strongest he remembered as to constructive notice.^(z)

30. In *Whitbread v. Jordan*,^(a) a mortgagee of a copyhold

(t) 22 Beav. 299.

(u) *Nelthorpe v. Holgate*, 1 Col. C. C. 203.

(x) *Taylor v. Baker*, 5 Price, 306; 1 Hare, 57; *Farrow v. Rees*, 4 Beav. 18.

(y) *Penny v. Watts*, 1 Mac. & G. 150.

(z) 2 De G. & Sm. 525; *Abbott v. Geraghty*, 4 Ir. Ch. R. 15.

(a) 1 Yo. & Col. 303; *vide infra*; *Worthington v. Morgan*, 16 Sim. 547, the

having obtained a legal surrender, was held bound by an equitable mortgage, created by the deposit of the copyhold muni-ments, although he had not notice of the deposit. Mr. Baron Alderson, in deciding the case, laid it down, that where a party having knowledge of such facts as would lead any honest man to make further inquiries, does not make, but on the contrary studiously avoids making, such obvious inquiries, he must be taken to have notice of those facts, which, if he had used such ordinary diligence, he would readily have ascertained. He is not, indeed, bound to an extraordinary circumspection, nor, on the other hand, is it necessary to make out express fraud on his part.^(a¹) If he be grossly negligent in omitting to inquire, it is at all events quite sufficient to fix him with notice; for as it is well laid down in 1 Eq. Ca. Ab. 331, pl. 7, the purchaser who cannot make out a title but by a deed which leads him to another fact, shall be presumed cognizant thereof, for it is *crassa negligentia* that he sought not after it.^(a²)

31. This, however, is an extension of the rule, which we should be cautious how we act upon in practice. It will probably tend to encourage mortgages by deposits, for in every case whether the *estate be freehold or copyhold, a *prudent* purchaser would inquire for the title deeds, and if he do not, he may, upon the authority of *Whitbread v. Jordan*, be fixed with notice of a deposit of them.⁽¹⁾ But the rule of equity not to relieve against a purchaser having the legal estate, is not confined to a prudent or wary purchaser, but to a *bond fide* one without notice. It could hardly be maintained that a deposit of deeds is of itself implied notice to a subsequent purchaser or mortgagee, who acting *bond fide*, but not cautiously, does not inquire after the deeds. In such a case both parties have acted without prudence; one has taken a deposit of the deeds without a conveyance, the other has obtained a conveyance without the deeds; and each, in the absence of fraud, is at liberty to make the best use he can of

same as to freeholds; *Finch v. Shaw*, aff'd (a¹) [See 1 Story Eq. Jur. §§ 400, 400 D. P. 19 Beav. 500; 2 Eq. R. 1117; *Ex a.*] *parte Reid*, 1 De G., B. C. 600. (a²) [*Post*, 775, s. 45, note (e).]

(1) A deposit of some of the material deeds may create an equitable mortgage, *Lacon v. Allen*, 3 Drew. 579.

his imperfect title. These observations do not apply to a case where no inquiry is made, in order that the fact of the deposit might not be disclosed. It has often happened in purchases of small portions of a large estate, that the purchasers, considering the sales as an accommodation to them, have not ventured to ask for more than a conveyance, and yet it never occurred to any one that the resting content with a mere conveyance gave such a purchaser implied notice of any deposit of the deeds, although it, of course, left him subject to all the existing incumbrances, as far as by their own force they could be established against him. There appeared at one time to be a disposition to carry this doctrine too far. *(b)* Clearly no case has established that the omission by a purchaser to call for the deeds affects him with notice of a fraud committed by the person of whom he was bound to make the inquiry. *(c)*

32. In the case of *Dryden v. Frost*, Lord Cottenham C. observed, that the mortgagee in that case was taking the title from a purchaser who was not in possession of the title deeds. They were in the possession of the plaintiff; a circumstance which, according to *Hiern v. Mill*, was of itself sufficient notice of the title of the party in possession of them. *(d)* But we may observe that there was another ground in *Dryden v. Frost*, which was quite conclusive; and in *Hiern v. Mill*, *(e)* before Lord Erskine, the purchaser knew at the time of his purchase that the deeds were in the possession of a third party, and did not choose to inquire of him whether he had any *claim; and indeed it is stated *(f)* that it was proved that the holder of the deeds gave distinct notice of his claim to the person who advertised the estate, and to the purchaser himself; and that, coupled with the knowledge of the possession of the deeds, was of course fully

(b) But now see *Jones v. Smith*, 1 Hare, 56, 64; 1 Phil. 244; 21 Beav. 434; *Farrow v. Rees*, 4 Beav. 18; *Atterbury v. Wallis*, 8 De G., M. & G. 454; *West v. Reid*, 2 Hare, 249; *Hewitt v. Loosemore*, 9 Hare, 449; *Stephenson v. Royce*, 5 Ir. Ch. Rep. 401; *Perry Herrick v. Attwood*, 2 De G. & J. 21, where the deeds were left with the mortgagor to enable him to make another mortgage; *Lloyd v. Attwood*, 3 De G. & J. 614; *Smith v. Evans*, 28 Beav. 29, which consider; *Carter v. Carter*, 3 K. & J. 646; *Stackhouse v. Lady Jersey*, 1 J. & H. 721; [*Layard v. Maud*, L. R. 4 Eq. 397; *Roberts v. Croft*, 2 De G. & J. (Am. ed.) 1, note (1).]

(c) *Hipkins v. Amery*, 2 Giff. 292.

(d) 3 My. & Cra. 670.

(e) 13 Ves. 114.

(f) 13 Ves. 116.

sufficient to bind him, although he did not buy the estate until a year afterwards.(g)

33. In *Colyer v. Finch* (h) a mortgagee who employed the mortgagor's solicitor to draw the mortgage deed obtained that deed and some wills and papers which the solicitor represented as constituting a perfect security, but although the mortgagor was entitled to the whole of the estate, yet there were early deeds not delivered up which showed his title to one moiety, and these deeds were subsequently delivered to a purchaser without notice, but the mortgagee was held not to have been guilty of culpable negligence, and therefore his priority was established.

34. But a deposit of deeds which do not relate to the title over which the charge is claimed, does not create any equitable mortgage over it. If a deposit is made of the deeds of Blackacre, with an assurance that they relate to Whiteacre, that will not create a charge on Whiteacre as against a third party with whom the deeds of Whiteacre may be deposited, although the depositor may be compelled to make good his representation.(i)

35. In the present state of the law, it seems expedient, before we proceed further, to draw the attention of the reader more distinctly to a few of the leading cases upon the doctrine of constructive notice. In *Kennedy v. Green* (k) an attorney upon a fraudulent pretence procured an assignment from his client of a mortgage which he had obtained for her, and subsequently made a mortgage of the property to an innocent party, and acted, as it was decided, as solicitor for the mortgagee, who had no other solicitor. The master of the rolls held that the knowledge of the solicitor of the fraud which he himself had committed, as much affected the mortgagee as if the solicitor had acquired that knowledge from a third person, but the lord chancellor (Lord Brougham) decided otherwise; he held that the actual and full knowledge which the solicitor possessed of his own fraud must be laid out of view; and the client, the last mortgagee, was not to be held cognizant—in law and con-

(g) P. 119, in the judgment.

Beav. 205; 2 De G. & J. 21; *Hunt v.*

(h) 5 H. L. Cas. 905; see pp. 925, 929, 930; *Todd v. Studholme*, 3 K. & J. 324;

Elmes, 28 Beav. 631.

(i) *Per Cur.* *Jones v. Williams*, 24 19 Beav. 511; *Roberts v. Croft*, 2 De G.

Beav. 47. *

& J. 1; *Perry Herrick v. Attwood*, 25

(k) 3 My. & Ke. 699.

structively — of the fraud merely because the solicitor, himself the contriver and the gainer of the transaction, knew it all well. And this seems to be the true rule; one's common sense revolts against an assumption that a solicitor committing such * a fraud would communicate the fact to his victim. But both the learned judges held that the contents of the last mortgage and the unusual way in which the receipt was indorsed and signed — of course no money was paid on this transfer *by the solicitor* — were such as should have led to inquiry and amounted to constructive notice. The solicitor committed, we may observe, the fraud upon his first client, and she by her negligence in executing the deed without reading it or inquiring why her name was to be indorsed by her on the deed, enabled him to commit a fraud on the solicitor's second client. Both were innocent, but one must suffer, and the suffering was inflicted on the last mortgagee, who did not notice the circumstances on the face of the deed, which had escaped the observation of the first mortgagee when she executed the deed in favor of her solicitor.

36. In *Hewitt v. Loosemore*,⁽¹⁾ a solicitor deposited a lease with a person as a security with a memorandum, and four years afterwards assigned the lease to another person by way of mortgage. This mortgagee, who was a farmer, had no notice of the previous deposit, and of course he did not obtain possession of the lease, but he asked the solicitor, the mortgagor, for it, who replied that it should be delivered to him, but that as he was rather busy then, he would look for it and give it to the farmer when he next came to market. V. C. Turner held that the mortgagee by assignment could not be charged with the money secured by the deposit. He held that as no other solicitor was employed, the mortgagor must be considered as the solicitor of the mortgagee, but he did not think that the latter was therefore to be considered to have had notice of the deposit; such notice would be constructive merely, and constructive notice was knowledge which the court imputes to a party, upon a presumption so strong that it cannot be allowed to be rebutted, that the knowledge must have been communicated, and he could not act upon such a presumption in the face of the evidence which the plaintiff himself had adduced (which evidence appears to have con-

⁽¹⁾ 9 Hare, 449.

sisted of passages in the answer read by the plaintiff, in which the defendant stated the transaction and expressly denied any notice whatever). In determining this point he did not proceed upon the case of *Kennedy v. Green*. *The well founded and wholesome limitation upon the doctrine of constructive notice established by that case* did not appear to him to apply to the present. There was here no fraud in the original deposit, and no fraud in the mortgage if the fact of the deposit was communicated to the mortgagee, and it would be a misapplication of *Kennedy v. Green* to hold that the fact of the deposit must be taken not to have been communicated, because it was a fraud to conceal it. So to apply the case would be, in trying the * question whether there was knowledge or not, to assume that there was fraud. It was also held that the inquiry made for the lease, and the reasonable excuse given left no ground for imputing suspicion of fraud or gross and wilful negligence, and the notice which is consequent upon it. It seems somewhat difficult to reconcile all the observations in this case. The learned judge agreed with the distinction laid down in *Kennedy v. Green*. In these cases fraud is not assumed, but as notice of the charge is withheld, and for a fraudulent purpose, viz., to conceal the charge or act for the benefit of the solicitor himself, the facts prove the fraud, and the question for the court is, shall the innocent purchaser be held to have implied notice of the fraud.

37. In *Atterbury v. Wallis*,^(m) Parsons in 1835 mortgaged in fee to Mrs. Warder seven houses, and on the 23d of May, 1838, he made a second mortgage in fee (subject to the first) to Lampray, his solicitor, of the seven houses and also other property. On the 29th of the same month of May, Lampray made a charge by way of submortgage of his securities to Mr. Atterbury and others whom he survived, so that the equity of redemption still remained in Lampray. So far there was no difficulty. But in April, 1839, Mrs. Warder, Lampray, and Parsons, conveyed the seven houses to Wallis in fee by way of mortgage. Out of the money advanced by Wallis, Mrs. Warder was paid off, and Lampray paid in part, but the mortgages to both of them were released, and the equity of redemption reserved to Parsons. Lampray acted, as it was stated, as solicitor of all

(m) 8 De G., M. & G. 454.

parties in this last transaction, and he entirely suppressed the mortgage he had executed on the 29th May, 1838. Of course he covenanted he had done no act to incumber and to produce the deeds of 23d May, 1838, as if they were the only deeds, and of course he was insolvent. The question in a redemption suit was whether Atterbury was liable to pay to Wallis more than he had paid to Mrs. Warder, or in other words, whether he was liable to the further charge created by the suppressed deed of 1839. Atterbury relied on first, notice of the deed of 29th May, 1838, through Lampray as his attorney; secondly, negligence in not calling for the mortgage to Lampray, which had ever since the execution of the deed of the 29th May, 1838, been held by the parties claiming under that deed. Wallis had no solicitor of his own, and he denied that he had employed Lampray as his solicitor. The first was a question of evidence, and the master of the rolls held that the evidence did not show that Wallis had employed Lampray as his solicitor. Upon the second question, the learned judge held that there was no culpable negligence, as the deed of 23d May, 1838, comprised other property besides the seven houses. Upon an appeal, the decree was reversed, the lords *justices being of opinion that Lampray acted in the transaction of 1839 as the solicitor of Wallis, and also of himself and Parsons; and that Wallis was affected with the notice which Lampray had of his own previous dealings. Lampray's fraud or concealment was treated as of no consequence, for Wallis must be considered in effect as if Lampray had previously told him why he had not the deed of 23d May, 1838, and where it was. Wallis's claim was considered to be as if the deed of 1839 had declared that it was to be without prejudice to Atterbury's rights, so that Wallis with the legal estate was postponed to Atterbury without it. *Kennedy v. Green* was held not to apply to this case, for there, there was fraud, independently of the question whether the act which had been done was made known or not. In such cases as the present the question of fraud wholly depends upon whether the act which has been done has been made known or not, and Lord J. Turner was moreover of opinion that the not inquiring for the deed of the 23d May was fatal to Wallis. Now, we may observe, that the first default of inquiry was by Atterbury himself, who taking a sub-

sidiary charge ought to have communicated with Parsons, the mortgagor, for he took subject to the actual state of the account with Parsons. Had he done so, the fraud committed by Lampray in 1839 could not have been effected, for Parsons would have had notice of the mortgage to Atterbury; but no reliance was placed on this ground. The distinction taken between the case and *Kennedy v. Green* requires much consideration. In each case, the solicitor had committed a fraud. In *Kennedy v. Green* the transfer to the attorney was fraudulent, no doubt, and in *Atterbury v. Wallis* there would have been no fraud if the submortgage had been disclosed, but the concealment of that for his own benefit at the expense of his client was a fraud, and the consequence to the victim of the fraud was in each case the same; there was no probability in either case that he would disclose that fraud to the person whom he sought to affect by it. Then the question arises, whether an innocent purchaser or mortgagee should be held to have had constructive notice of the fraud which his solicitor is actually committing against him. The reversal was not placed upon culpable negligence in not requiring the deed of the 23d May, and it may be thought that the decree at the rolls on that point should not have been disturbed.

38. Where an attorney on behalf of his principal borrowed a sum of money of a man and his wife, and ultimately delivered to them as a security a policy of assurance belonging to his principal, and executed an agreement accordingly, signed W. Perry [the principal] — his attorney, Parkinson, and the attorney acted fraudulently with the money; it was attempted to fix the lenders with constructive notice, as Parkinson prepared the agreement and was the only attorney employed, but it was decided otherwise. Lord Campbell C. * said that the point could hardly be seriously contended; although the lenders had no other attorney it was clear that Parkinson was not their attorney. It did not follow that if there was not an attorney on each side, the attorney who did act was the attorney of both. It was clear that Parkinson was acting only for Perry, and there was no ground for saying that he was employed as the solicitor of the lenders; and to go on to say that when Parkinson was *ipse doli fabricator*, and knew the iniquity which he contemplated, his knowledge of that should be the knowledge of the lenders —

would be really almost exposing the doctrine of notice to ridicule.(n) This seems to establish the true rule.

39. Where the seller had received only part of the purchase money, and therefore kept possession of the conveyance to the purchaser and of the title deeds, and a mortgage was taken by a third person for a previous debt without asking for the deeds, but there was no allegation of fraud, the vice chancellor held that it was his duty, before he took his mortgage, to ask for the deeds, and if he had asked for them he would have learnt that they were in the possession of persons who claimed a lien for unpaid purchase money, and he must be taken to have had notice of those circumstances which, if he had not neglected the duty, would have come to his knowledge.(o) But still he agreed with the rule as previously laid down by Lord Cottenham, that the mere fact of the possession of the title deeds by the mortgagor is not conclusive against the mortgagee: to postpone the incumbrancer there must also be improper conduct on his part; (p) and this, no doubt, is the true rule.

40. But where a man advanced his money *bonâ fide* upon mortgage, with notice of a marriage settlement by the mortgagor, which was represented to him by the husband and wife to be confined to her fortune, and the deed was not produced, and he had no further knowledge of it before he advanced his money; it was held that he was not bound by constructive notice that the settlement really did settle the estate itself; (q) for it was said, that there is no legal or equitable presumption that a man makes a settlement of his landed estate on his marriage; and this was affirmed by Lord Lyndhurst.(r) The want of caution in not inquiring further was not sufficient to affect the party with notice. It was not a case of gross negligence.(s) In this case the learned V. C. Wigram elaborately reviewed the cases upon constructive notice, disclaiming an intention to define what in * the abstract is to be deemed constructive notice; and speaking

(n) Perry v. Holl, 2 De G., F. & J. 38, see *supra*, pl. 8.

(o) Worthington v. Morgan, 16 Sim. 547; 13 Jur. 316.

(p) Allen v. Knight, on app.; 11 Jur. 527, per Ld. Cottenham; Waldron v. Sloper, 1 Drew. 193.

(q) Jones v. Smith, 1 Hare, 43, 1 Phil. 244; Bird v. Fox, 11 Hare, 40; West v. Reid, 2 Hare, 257; 4 Yo. & Col. 563, n.; Allen v. Knight, 5 Hare, 272; 11 Jur. 527, on app.; 16 Sim. 550.

(r) 1 Phil. 244.

(s) 1 Phil. 257.

only for his present purpose, he stated that they resolved themselves into two classes: 1st, Cases in which the party charged had actual notice that the property in dispute was, in fact, in some way affected, and this has bound him with constructive notice of facts and instruments to a knowledge of which he would have been led by an inquiry after the charge, incumbrance, or other circumstance affecting the property of which he had actual notice; and 2dly, Cases in which the party charged had designedly abstained from inquiry for the very purpose of avoiding notice.^(t) In a later case,^(u) he enforced his views, and explained that he had no intention of saying anything which should lead to the conclusion that there may not be *crassa negligentia* which a court of justice may treat as evidence of fraud, although, morally speaking, the party may be perfectly innocent.^(u¹)

41. Where a purchaser bought an estate free from land tax, which the conveyance stated to have been redeemed, yet as he had notice of the contract for redemption which showed that the purchase was on behalf of an infant, and there had been a decree for securing to him an annuity out of the estate equal to the land tax, the purchaser was held bound by this notice, although he had no notice of the decree, and the estate had been treated for a considerable time as discharged of land tax. This case would fall in this view within Vice Chancellor Wigram's first class of cases; ^(v) but this decree was reversed, and it was held that there was not sufficient to put the purchaser on inquiry, for the redemption might have been made with money properly applicable to the purchase of the land tax; the question was, whether the not obtaining the knowledge of the charge was an act of gross or culpable negligence.

42. So where a man mortgaged buildings to A., with a covenant to insure against fire, and to apply the money in rebuilding

(t) 1 Hare, 55; 24 Beav. 62.

(u) West v. Reid, 2 Hare, 257, 258; Gurney v. Ld. Oranmore, 4 Ir. Ch. Rep. 470; 5 Ir. Ch. Rep. 436; Montefiore v. Browne, S. C. 7 H. L. Cas. 241.

(u¹) [Kerr F. & M. (1st Am. ed.) 237, 238; Maitland v. Backhouse, 17 L. J., Ch. 121; Jones v. Williams, 24 Beav. 47; Mayor

of Berwick v. Murray, 7 De G., M. & G.

497; Knight v. Boyer, 2 De G. & J. 450; Owen v. Homan, 4 H. L. Cas. 1035; Oliver v. Piatt, 3 How. (U. S.) 333; Jenkins v. Eldredge, 3 Story, 181; ante, 755, note (g).]

(v) Ware v. Ld. Egmont, 4 De G., M. & G. 460; 4 Ir. Ch. Rep. 486.

or repairing on the premises, or at the option of the mortgagee in discharge of the money then due to him, and a fire occurred, but before the rebuilding the mortgagor purchased an adjoining slip of ground, and rebuilt upon both properties, and then mortgaged the whole of the property, including the buildings and the slip, to B., and the deed recited the former mortgage in the usual way — A. claimed as against B. the benefit of the expenditure on the slip and the portion of the buildings on it, on the ground of notice of the first mortgage; but this was refused, because notice of a covenant to rebuild after fire cannot be deemed notice that the covenant has not been performed, or that * this violation has taken place without the consent of the first mortgagee; if the fact be so, a purchaser and mortgagee stand in the same situation.(x)

43. Though the purchaser of a charity lease is bound to know from whom the lessor derived his title, yet he will not be held to have notice that the lease was bad; that depending on a number or circumstances *dehors* the lease.(y) But this, of course, as in all other cases of notice, only prevails in equity; for although a purchaser has actual notice of a lease, yet if it be invalid he may at law recover the possession from the lessee.(z)

44. Notice of a tenancy will not, it seems, affect a purchaser with constructive notice of the lessor's title.(z¹) Therefore, if a person equitably entitled to an estate let it to a tenant who takes possession, and then the person having the legal estate sells to a person who purchases *bonâ fide* and without notice of the equitable claim, the purchaser will hold against the equitable owner, although he had notice of the tenant being in possession. So a purchaser *bonâ fide* and without notice cannot be affected by the mere circumstance of the vendor having been out of possession many years.(a) In a late important case in the privy council, it was observed by the learned person by whom the opinion of the council was delivered,(b) that in all the cases the possession relied

(x) *Harryman v. Collins*, 18 Beav. 11.

(y) *Atty. Gen. v. Backhouse*, 17 Ves. 293; 3 Rid. P. C. 512; 1 Hare, 63.

(z) *Doe v. Luffkin*, 4 East, 221.

(z¹) [See *Dickey v. Lyon*, 19 Iowa, 544.]

(a) *Oxwick v. Plumer*, Bac. Abr. tit.

Mortgage (E.); 2 Ver. 636; reported Gilb. E. R. 13, as noticed in 1 Hare, 63, 9 Moo. P. C. 34.

(b) *Barnhart v. Greenshields*, 9 Moo. P. C. 18, 2 Eq. R. 1217, per Pemberton Leigh, P. C.

on was the *actual occupation* of the land, and that the equity sought to be enforced was on behalf of the party so in possession. There was no authority for the proposition that notice of a tenancy is notice of the title of the lessor, or that a purchaser neglecting to inquire into the title of the occupier is affected by any other equities than those which such occupier may insist on; and this view was strictly and properly applied to the case upon appeal. But it has been laid down that the court, in the passages in the judgment in which they speak of *the person in occupation*, did not mean merely the person who by himself and his laborers tilled the land, but also meant the person who is known to receive the rents from the person in occupation of the land.(c) The actual terre-tenant almost invariably is not the owner, but the person to whom he pays the rent is the owner, and accordingly notice to a purchaser that the rents were received not by the seller but by a receiver for other persons, was held, with some difference of opinion, to bind him by their rights.

* 45. In all cases where a purchaser cannot make out a title but by a deed which leads him to another fact, whether by description of the parties, recital or otherwise, he will be deemed conusant thereof; for it was *crassa negligentia* that he sought not after it; (d) and for the same reason, if a purchaser has notice of a deed he is bound by *all* its contents.(e)

(c) Knight v. Bowyer, 23 Beav. 609, 640, 641; 2 De G. & J. 421.

(d) Bisco v. Earl of Banbury, 1 Ch. C. 87; Moore v. Bennett, 2 Ch. C. 246; Ferrars v. Cherry; Drapers' Company v. Yardley, 2 Ver. 384, 662; Mertins v. Jolliffe, Amb. 313; Bury v. Bury, App. Purch. No. 25; Coppin v. Fernyhough, 2 Bro. C. C. 291; S. P. per Ld. Keeper Henley, Howarth v. Powell, T. Vac. 1758, MS.; 1 Eden, 51, *nom.* Howarth v. Deem; Malpas v. Ackland, 3 Rus. 273; Buckley v. Lanauze, 1 Rep. t. Plunk. 327; Davies v. Thomas, 2 Yo. & Col. 234; Webb v. Lugar, 2 Yo. & Col. 247; 1 Hare, 59; 1 Phil. 254; 2 Hare, 257; Nixon v. Robinson, 2 J. & L. 14.

(e) Tanner v. Florence, 1 Ch. C. 259; Taylor v. Stibbert, 2 Ves. jr. 437; Hall v. Smith, 14 Ves. 426; Daniels v. Davison,

16 Ves. 249; which have overruled Phillips v. Redhil, 2 Ver. 160; Stewart v. Marquis of Conyngham, 1 Ir. Ch. Rep. 545; Drysdale v. Mace, 2 Sm. & Gif. 225; [George v. Kent, 7 Allen, 16, 18; Pike v. Goodnow, 12 Allen, 472, 474; 1 Story Eq. Jur. § 400; Cuyler v. Brandt, 2 Caines Cas. in Err. 326; Doughaday v. Paine, 6 Minn. 443; Gibert v. Peteler, 38 Barb. 488; 4 Kent (11th ed.), 179; Willis v. Butcher, 2 Binn. 466; Frost v. Beekman, 1 John. Ch. 299, 300; Jackson v. Neely, 10 John. 374; Chautauque Co. Bank v. Risley, 4 Denio, 480; Irwin v. Campbell, 6 Binn. 119; Brush v. Ware, 15 Peters (U. S.), 113, 114; Boggs v. Varnor, 6 Watts & S. 469; McCesky v. Leadbetter, 1 Kelly, 551; Blake v. Tucker, 12 Vt. 39; Crosby v. Chase, 17 Maine, 369; Thompson v. Blair, 3 Murph. 583; Graves v.

46. And where a mortgage was made by a devisee in fee, who was subject to debts and legacies, and the legacies were left as charges on the estate by the mortgage, and a second mortgage was made to a third person, which referred to the first mortgage, but did not notice the charge of the legacies; yet the second mortgagee was held to have notice of it, because she could only be considered as a mortgagee of the equity of redemption, which remained in the mortgagor after the execution of the first mortgage.(f)

47. Where a purchaser from an heir at law, with notice of a will by the ancestor, is ignorant of the contents of the will, or is misled by the heir at law, it seems that if the testator has been long dead, and the heir long in possession, and the other circumstances such as to leave the purchaser in credit for perfect good faith, equity would not interfere against the legal estate only because the purchaser had notice of a will respecting which he was misled. If the death of the testator were recent, other circumstances might arise affecting the purchaser with the imputation of fraudulent blindness.(g) We should distinguish between general notice of an instrument which may bind a purchaser to all its contents, and notice given by a purchaser of a chose in action to trustees, in which he omits to mention a portion of the interests secured to him, which latter would only bind a subse-

Graves, 1 A. K. Marsh. 165; Bonner v. Ware, 10 Ohio, 465; Cook v. Farrington, 10 Gray, 70, 71; Bancroft v. Consen, 13 Allen, 50; Blaisdell v. Stevens, 16 Vt. 179; Williams v. Fullerton, 20 Vt. 346; Kerr F. & M. (1st Am. ed.) 240 *et seq.*; Clements v. Welles, L. R. 1 Eq. 200. Grantees are chargeable with notice of all liens reserved in the deeds under which their grantor claims. Burrus v. Roulhac, 2 Bush (Ky.), 39. A deed made "subject to all the privileges and rights heretofore deeded away," is limited by a prior deed of the same grantor, although the latter is not recorded. Cook v. Farrington, 10 Gray, 70, 71; see White v. Kibby, 42 Ill. 510. So a conveyance merely of "all the grantor's right, title, and interest" in certain real estate, does not convey land which he had already conveyed by an unrecorded deed, and of which the second

grantee had no notice. Jamaica Pond Aqueduct Corp. v. Chandler, 9 Allen, 169, 170; Adams v. Cuddy, 13 Pick. 460; Chaffin v. Chaffin, 4 Gray, 280. A party, who takes his title under a deed of quitclaim simply, was held in May v. Le Claire, 11 Wallace, 217, not entitled to be regarded as a *bonâ fide* purchaser for value. See Miller v. Fraley, 23 Ark. 735. The assignee in bankruptcy stands in the place of the bankrupt, and takes only the property he had, subject to all valid claims, heirs, and equities. *Ex parte Dalby*, 1 Lowell, 431; Winsor v. McClellan, 2 Story, 492; but see Bingham v. Jordan, 1 Allen, 373; Travis v. Bishop, 13 Met. 304.]

(f) Eland v. Eland, 1 Beav. 235; Hope v. Liddell, 21 Beav. 183.

(g) Jones v. Smith, 1 Hare, 60, 61, *per Cur.*

quent *bonâ fide* purchaser to the extent of the interest mentioned in the notice.(h)

48. If a man purchase from a seller whose conveyance was subject to all the mortgages and charges affecting the same, he will be bound by a prior deposit of the deeds relating to a portion of the estate of which he had not notice, although there were other charges of which he was informed, which satisfied the words mortgages *and charges: he ought to have inquired specially after *all* mortgages and charges.(i)

49. Where in a deed of conveyance to himself obtained by a solicitor by fraud there was an unusual indorsement of the receipt for the consideration money, so that it might have been fraudulently used; it was held that this was notice, as it naturally led to inquiry. And as the solicitor who committed the fraud acted for a mortgagee of whom he borrowed money, the latter was held bound by this constructive notice to his solicitor,(k) although he was also his mortgagor. This is a case of great nicety and difficulty.

50. In a later case (l) in which the consideration was paid partly in money and partly by a bill, which by the deed were acknowledged to be "in full satisfaction for the absolute purchase," an opinion was expressed, on the authority of *Kennedy v. Green*, that a subsequent purchaser was, from the form of the deed, and the bill not having come to maturity, bound to inquire of the first seller whether his lien for the purchase money had been discharged, or whether the contract was to take the bill as a substitution for the money. But it is hard to bind purchasers by such ambiguous words, and a disinclination has been shown to extend this doctrine. Upon the sale of an advowson, a sub-purchaser was not deemed to have had constructive notice of the original seller's alleged lunacy, from the circumstances, — 1. that no receipt for

(h) *In re Bight's Trustees*, 21 Beav. 399; 1 Hare, 57; 1 Phil. 256; *supra*, pl. 430. [See *Boggs v. Varner*, 6 Watts & S. 469. One who takes a deed "subject to a mortgage" &c., in which mortgage there is reference to a prior deed, is chargeable with notice of the prior deed. *Brown v. Eastman*, 16 N. H. 588.]

(i) *Jones v. Williams*, 24 Beav. 47.

(k) *Kennedy v. Green*, 3 My. & K.

35; *Neesom v. Clarkson*, 2 Hare, 163; *Atkins v. Delmage*, 12 Ir. E. R. 1; *Hiorns v. Holton*, 16 Beav. 259; *Robinson v. Briggs*, 1 Sm. & Gif. 188. [See *Bowers v. Johnson*, 10 Sm. & M. 169.]

(l) *Frail v. Ellis*, 16 Beav. 350. There was a parol agreement for a lien, and the purchaser had notice of it.

the purchase money (which was paid) was indorsed on the deed; 2. the non-residence of the incumbent; and 3. the alleged inadequacy of the consideration.^(m)

51. If a man agrees to purchase under limitations in a deed, which makes it necessary upon that transaction for him to look into that deed, he must be taken to have seen the whole, and must consequently be presumed to have taken notice of everything contained in it affecting his purchase.⁽ⁿ⁾

52. So if an estate be subject to incumbrances, and be given by the owner in consideration of another estate given to him, the latter estate is subject in equity to the incumbrances charged at law on the former, and a purchaser, with notice of the transaction, is liable to the incumbrances, although he had not notice of them. This was decided by Lord Redesdale, who considered it sufficient that the purchaser, by notice of the deed, had notice of the equity, although he had not notice of the particular incumbrance. This, he said, was an equity of which every purchaser under a settlement must have notice; for it is a clear rule, that a man cannot claim under a deed, and avoid *the deed; he must submit to the whole; and he has notice of everything of which the vendor had notice, so far as concerns that deed.^(o) This, it may be observed, was an opinion not intended to decide the case, although it was acquiesced in. It carries the rule much farther, it is apprehended, than is warranted by either principle or authority.^(p)

53. The doctrine of constructive notice on this head was carried a long way in *Montefiore v. Browne*, which was decided in Ireland, and the decree affirmed in the House of Lords.^(p¹) Denis Browne, in 1810, lent 2,200*l.* charity funds to Dominick G. and Dominick Browne, and separate judgments in 1810 were entered up against them in favor of Denis Browne. In 1811, Denis advanced 1,000*l.* more of the same funds to Dominick G. Browne, and took a bond and a judgment of 1812 for securing it. In 1815, Denis Browne advanced 1,600*l.* and 500*l.* out of the

(m) *Greenslade v. Dare*, 20 Beav. 284. Robinson, 1 C. E. Green (N. J.), 256;

(n) *Hamilton v. Royse*, 2 Sch. & Lef. Gordon v. Sizer, 39 Miss. 805.]

326; [*Sawyer v. Hammatt*, 15 Maine, 40.]

(o) *Hamilton v. Royse*, 2 Sch. & Lef. 315; 4 Ir. Ch. R. 415; *Harryman v. Collins*, 18 Beav. 11, *supra*; [*Van Doren v.*

(p) *Llo. & Goo. t. Sugd.* 263, 264; *Pow er v. Standish*, 8 Ir. E. R. 526.

(p¹) [7 H. L. Cas. 241.]

same funds to Dominick G. and Dominick Browne, and they were secured by bonds and separate judgments against each of them. These latter advances of 1,600*l.* and 500*l.* were paid off about the time of the execution of the mortgage upon which the question arose, and upon them, or the judgments to secure them, there was no dispute; but this payment seems to show the diligence of the mortgagees in having all the judgments satisfied. To return to the other sums, amounting to 3,200*l.*: With a view to family arrangements, Dominick G. Browne and Dominick Browne agreed to become joint debtors for the whole of the 3,200*l.*, and accordingly, in February, 1819, they secured it to Denis Browne by their joint and several bond, with a warrant of attorney to enter up judgment thereon, and in April in the same year, Denis executed warrants of attorney to enter up satisfaction on the judgments of 1810 and 1812. Dominick G. and Dominick Browne conveyed some of their estates to trustees to sell, and out of the proceeds to pay amongst other sums "3,200*l.* due to Denis Browne as trustee *on a judgment against the said Dominick G. Browne and Dominick Browne.*" Denis Browne died in 1826, without having entered up judgment on the new bond, and Dominick Browne having survived his father, D. G. Browne, in 1832, mortgaged the property conveyed to the trustees for sale, to an insurance company for 56,000*l.*, and the trustees for sale joined in the mortgage. The mortgage deed recited the conveyance to the trustees to sell, and stated the trust to be to pay, amongst other sums, "3,200*l.* to Denis Browne, as trustee on a judgment against the said Dominick G. Browne and Dominick Browne," although there was no such judgment; and also recited that the 3,200*l.*, and all *interest thereon, had been paid by Dominick Browne (but this was not true), and that satisfaction was intended to be forthwith entered up on the said judgments for securing the same, and all other judgments affecting the land. The company searched for judgments, and procured satisfaction to be entered up on those of 1810 and 1812, under the warrants of attorney of 1819, executed by Denis Browne. In 1838, judgments were entered up on the bond of 1819 against Dominick Browne, and the executors of Dominick G. Browne, and the former secured arrears of interest by a further judgment in 1839, and paid interest on the whole debt, including the 3,200*l.*,

up to 1842; and in 1843 the mortgagees filed their bill, and it was held that they had implied notice of the debt due to Denis Browne as trustee. They no doubt had express notice of the debt for 3,200*l.*, and they had like notice by the deed of 1823, and their mortgage deed, that it was secured by a judgment against the two Brownes, but the latter instrument assured them — and the trustee for sale and for payment of the debt was a party to the deed — that it had been paid, and that satisfaction was intended to be forthwith entered up on the judgments (observe) for securing the same, and all other judgments. They had no notice of the bond of 1819, and Denis Browne, the obligee, had neglected to enter up judgment on it. When they searched they found the two judgments, one against the two Brownes, and the other against one of them, for sums amounting together to 3,200*l.*, and of course they found no judgment against both for the whole. It would seem, therefore, that they were warranted in considering the judgments which they did find for the exact sum stated, to be the security referred to, and in truth, although there were separate judgments, yet each of the Brownes was bound by judgment for the whole of 2,200*l.* part of the judgment, and although the recital in the mortgage deed stated that the 3,200*l.* was secured on *a judgment* against the two, yet it went on to state that the money was paid, which was well calculated to lull suspicion, and that satisfaction was forthwith to be entered on *the judgments*, in the plural, for securing the same, which the mortgagees might well consider referred to the judgments which they had found, and upon which they procured satisfaction to be entered up. To what else could they refer then? The recital of the intention to enter up satisfaction upon all other judgments no doubt referred to the judgments of 1815, upon which satisfaction was entered up. It was however held, that the mortgagees ought to have called for the warrant of attorney upon which satisfaction on the judgments for the 3,200*l.* was entered up, and that would have led to a knowledge of the new bond of 1819, or they should have inquired either of the representative of the trustee, or of the officers of the charity, and the truth * must have transpired; they were considered guilty of gross negligence, and were, therefore, postponed to a creditor who had for many years neglected to enter up judgment under his war-

rant of attorney ; and had, it would seem, neglected to inform the trustee for sale, that the old securities were extinguished, and a new one taken ; for if he had given such notice, of course the trustees would have cleared up the misunderstanding at the time of the mortgage. The case shows to what danger a purchaser or mortgagee is exposed by this doctrine of constructive notice. I fear that, if still at the bar, I should have thought that further inquiry on the part of the mortgagees was unnecessary.

54. In the case of *Peto v. Hammond*, before referred to, (g) the allottees, and the purchasers from them, who had not inquired for the conveyance to the trustees of the society, were held bound, not only by notice of the deed, but also to what would have inevitably been told to them if they had inquired for the deed, viz., that the deed had been retained by the seller to the trustees as an equitable mortgagee, with a covenant from the trustees to convey the legal estate to him if required.

55. If a purchaser had notice only that a draft of a deed was prepared, and not that the deed was executed, he would not be bound by the notice, although the deed really was executed ; for a purchaser is not to be affected by notice of a *deed in contemplation*. (r)

56. Where a husband has not performed a marriage agreement on his part, he is not entitled to claim the benefit of it, (s) and a purchaser from him of the consideration for the settlement by the wife, with notice of the deed, will be bound by the same equity as the husband was. (t)

57. So where mutual settlements had been made by husband and wife previously to marriage, and the wife surviving, had fraudulently obtained the funds settled by her, a rentcharge secured to her by a separate deed upon the husband's estate was held liable to make good the loss occasioned by her fraud, and a purchaser from her of the rentcharge, with notice of the transaction, was held equally liable. (u) But there the purchaser had notice of all the facts.

(g) 8 Jur. N. S. 550 ; ch. 10, s. 1, pl. 51, 728, note ; *Rogers v. Jones*, 8 N. H. 264, 268, 269.]

(r) *Cothay v. Sydenham*, 2 Bro. C. C. 391 ; 1 Hare, 63 ; 1 Phil. 256 ; [*Cushing v. Hurd*, 4 Pick. 253 ; *Warden v. Adams*, 15 Mass. 233 ; *M'Gregor v. Brown*, 5 Pick.

(s) *Mitford v. Mitford*, 9 Ves. 87 ; *Bas-levi v. Serra*, 14 Ves. 313.

(t) *Harvey v. Ashley*, 2 Sch. & Lef. 328.

174 ; *Brackett v. Waite*, 6 Vt. 411 ; ante, (u) *Woodyatt v. Gresley*, 8 Sim. 180.

58. But the recital in a deed of a fact, which may or may not, according to circumstances, be held in a court of equity to amount to a fraud, will not affect a purchaser for valuable consideration denying actual notice of the fraud.(x) Nor will circumstances amounting to a *mere suspicion* of fraud be deemed notice thereof to a purchaser. This question constantly arises in practice, on sales by tenant for life * and a child to whom he has appointed the estate under an exclusive power of appointment amongst his children. If there was any underhand agreement between the father and son, the power would be deemed fraudulently executed, and the other children might be relieved against it. The difficulty on the part of a purchaser is to ascertain what circumstances, independently of a direct statement of the fact, are sufficient to fix the purchaser with presumptive notice of fraud. Lord Eldon has greatly relieved this difficulty by deciding, that the mere circumstance of the father first contracting to sell the estate, and then appointing to one child, who joins in the sale, will not affect the purchaser where the contract appears to have been fair and the purchase money to have been paid to all the parties, and there is nothing to show that the son was not to receive a due proportion of the money.(y)

59. And here we may observe that if the seller, with knowledge, misrepresent his interest, and the purchaser did not know the truth although he had the means of finding it out, he may maintain an action for damages against the seller after the completion of the purchase.(z)

60. It has been said that the court-rolls are the title deeds of copyholds, and a purchaser is affected with notice of the court-rolls as far back as a search is necessary for the security of the title.(a) But this does not accord with the general rule as to judgments, registered deeds, and the like, and would lead to great inconvenience in practice. It frequently happens that pur-

(x) *Kenney v. Browne*, 3 Ridg. P. C. 512; 17 Ves. 293.

(y) *M'Queen v. Farquhar*, 11 Ves. 467; see *Hannah v. Hobson*, 30 Beav. 19; 7 Jur. N. S. 1092; *sup.* p. 393.

(z) *Ferrier v. Peacock*, 2 Fost. & Fin. 717. [See *Blatchley v. Osborn*, 33 Conn. 226.]

(a) *Pearce v. Newlyn*, 3 Mad. 186; 18 Ves. 462; *Bugden v. Bignold*, 2 Yo. & Col. C. C. 377, *contra*; see as to a deposit of copy of court roll, *Tylee v. Webb*, 6 Beav. 552; 14 Beav. 14; as to relief against the solicitor.

chasers of property of small value accept the title of a great family under the last settlement, and it would be impossible to hold that they were bound by notice of the contents of the early deeds if not referred to by the settlement. A purchaser of a copyhold estate is furnished with an abstract of the surrenders and admissions, and requires copies of the material ones; but, in point of fact, the court-rolls are scarcely ever searched by a purchaser, and it has always been understood, in practice, that he is not bound by notice of their contents.

61. But a steward of a manor who has admitted mortgagees cannot afterwards take a mortgage himself, and, alleging want of notice, buy in the first, and so exclude the mesne incumbrances.(b)

62. If a purchaser have notice that the title is a mortgage one, he must run the risk whether it is redeemable or not.(c)

63. The better opinion is, that being a witness to the execution of * a deed will not of itself be notice; for a witness, in practice, is not privy to the contents of the deed.(d) This question might arise between a purchaser who had, previously to his purchase, attested the execution of a deed relating to the estate, and the person in whose favor the deed was executed. But such a purchaser acting *bonâ fide* would not incur any risk.

64. Where a settlement is made in pursuance of articles, but the estate is, contrary to the intention of the parties, limited so as to enable the parent to dispose of it, the court will rectify the settlement according to the intention, in favor of the issue, as between themselves, or as between themselves and persons claiming under the parent without consideration; but this has never yet been done against a purchaser.(e) In *Senhouse v. Earle*,(f)

(b) *Brothers v. Bence*, Fitz. 118.

(c) *Hansard v. Hardy*, 18 Ves. 462.

(d) *Mocatta v. Murgatroyd*, 1 P. Wms. 393; *Welford v. Beezley*, 1 Ves. 6; *Beckett v. Cordley*, 1 Bro. C. C. 357; 1 Ves. jr. 55; *Harding v. Crethorn*, 1 Esp. 56; *Holmes v. Custance*, 12 Ves. 279; *Biddulph v. St. John*, 2 Sch. & Lef. 521; *Reed v. Williams*, 5 Taunt. 257; 6 Dow, 224; *Doe v. Burdett* 1 Per. & Da. 670; *Rancliff v. Parkyns*, 6 Dow, 210, 224; *Sugd. H. of L.* 76; *Abbott v. Geraghty*, 4

Ir. C. L. Rep. 15. [See *Brinckerhoff v. Lansing*, 4 John. Ch. 65, 70. Nor is the magistrate, who takes the acknowledgment, presumed to be. *Lawrence v. Tucker*, 7 Greenl. 195, 200. But the clerk of a circuit court, in which a suit for specific performance of a contract for the sale of land is pending, has been held thereby to have notice of the claim of the plaintiff. *Dickerson v. Campbell*, 32 Missou. 544.]

(e) *Warrick v. Warrick*, 3 Atk. 291.

(f) *Amb.* 285.

Lord Hardwicke drew a distinction between ancient articles and modern ones, and expressed his opinion, that in the case of ancient articles the purchaser should not be disturbed, because modern methods of conveyancing were not to be construed to affect ancient notions of equity; but in case of notice of modern articles, he thought the court ought to carry them into execution against a purchaser. But in a later case,^(g) Lord Northington seemed rather of opinion that no relief should be granted against a purchaser; but this case is not satisfactory, as the language attributed to the chancellor, on the principal question in that case, is not consistent with the prior authorities. Of course a purchaser cannot be advised to accept a title depending on a settlement made in pursuance of articles, but not framed according to the general rules of equity; and, certainly, a court of equity would not compel a purchaser to take such a title, although no relief might be granted to his prejudice if he actually had purchased.

65. Before we quit the important subject of implied notice, I may observe that every one who has attempted to define what it is, has declared his inability to satisfy even himself. The following opinions delivered by learned judges may assist the reader in case he should make the attempt.

66. In *Jones v. Smith*,^(h) V. C. Wigram observed, that it was scarcely possible to declare *à priori* what shall be deemed constructive * notice, because unquestionably that which may not affect one man may be abundantly sufficient to affect another. He considered that the cases in which constructive notice has been established resolve themselves into two classes. First, cases in which the party to be charged has had actual notice that the property in dispute was in fact charged, incumbered, or in some way affected, and the court has thereupon bound him with constructive notice of facts and instruments to a knowledge of which he would have been led by an inquiry after the charge, incumbrance, or other circumstance affecting the property of

^(g) *Cordwell v. Mackrill*, Amb. 515; *Matthews v. Jones*, 2 Ans. 596; *Davies v. 2 Ed.* 347; *Hardy v. Reeves*, 4 Ves. 466; *Davies*, 4 Beav. 54. 5 Ves. 426; *Parker v. Brooke*, 9 Ves. 583; ^(h) 1 Hare, 55.

which he had actual notice ; and, secondly, cases in which the court has been satisfied, from the evidence before it, that the party charged had designedly abstained from inquiry for the very purpose of avoiding notice. Upon the same point, Lord Chancellor Brougham observed, that the doctrine of constructive notice depends upon two considerations ; first, that certain things existing in the relation or the conduct of parties beget a presumption so strong of actual knowledge that the law holds the knowledge to exist, because it is highly improbable it should not ; and, second, that policy, and the safety of the public, forbids a person to deny knowledge while he is so dealing as to keep himself ignorant, and yet all the while let his agent know, and himself perhaps profit by that knowledge. Whatever is notice enough to excite attention and put the party on his guard, and call for inquiry, is also notice of everything to which it is afterwards found that such inquiry might have led, although all was unknown for want of the investigation.(i)

67. In *Ware v. Lord Egmont*,(j) the lord chancellor, Lord Cranworth, expressed his entire concurrence in what on many occasions of late years had fallen from judges of great eminence on the subject of constructive notice, namely, that it was highly inexpedient for courts of equity to extend the doctrine — to attempt to apply it to cases to which it had not hitherto been held applicable. When a person has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the court to say not only that he might have acquired, but also that he ought to have acquired the notice with which it is sought to affect him ; that he would have acquired it but for his gross negligence in the conduct of the business in question. The question when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence. It was obvious that no definite rule as to what will amount to gross or culpable negligence, so as to meet * every case, could possibly be laid down

(i) *Per Cur.* 3 My. & Ke. 719.

(j) 4 De G., M. & G. 473 ; and see 7 H. L. Cas. 241.

And in a later case, *(k)* the same learned judge observed, that he believed that the length to which the doctrine of constructive notice had been extended, had been often productive of very considerable inconvenience, and had injuriously impeded the free transfer of real property. And in *Montefiore v. Browne*, in the House of Lords, *(l)* the lord chancellor, Lord Chelmsford, said that he agreed with the cases cited, that constructive notice cannot be imputed to a party unless his ignorance amounts to gross or culpable ignorance; and he also agreed in what was said by Lord Cranworth in *Ware v. Lord Egmont*, which corresponded with what Wigram V. C. said in *Jones v. Smith*; and Lord Cranworth observed, that he did not recede from what he had said. These observations show how little capable the doctrine is of a strict definition. The writer prevailed upon the House of Lords four times to pass a clause limiting the operation of implied notice against an innocent purchaser. The clause was slightly varied from time to time, in order if possible to meet the views of the House of Commons. The bill was constantly opposed there. In the bill sent down to that house this session, 1862, the clause stood thus: "Where a purchaser for valuable consideration, or mortgagee, or his solicitor or agent, has not direct notice of any act, fact, instrument, or incumbrance affecting the title to the property purchased or taken in mortgage, but is sought to be charged by or through what is termed in law implied or constructive notice, such purchaser or mortgagee shall not be charged or made liable by reason of any such act, fact, instrument, or incumbrance, unless the court before which the question is raised shall be of opinion that the conduct of such purchaser or mortgagee amounted to fraud, or unless the circumstances of the case are such as to satisfy the court not only that he might have acquired, but that in the exercise of ordinary care and diligence he ought to have acquired, the knowledge with which it is sought to affect him." Lord Chancellor Campbell, in former sessions, made two powerful speeches in favor of the bill, and whilst it was before Parliament, Vice Chancellor Wood, in addressing himself to the subject, observed *(m)* that the hardship which sometimes arises sprang from the difficulty of drawing

(k) *Atty. Gen. v. Stephens*, 6 De G., M. & G. 148.

(l) 7 H. L. Cas. 241, 269.

(m) 1 J. & H. 702.

the nice distinction between cases of fraud, and mere cases of implied notice. An attempt, he observed, was being made to draw this distinction by legislation. The matter was in able hands, and its result would he hoped prove successful. The clause was, upon a division, carried by a majority of eleven; fifty-six for it and forty-five against it. The opposition to it, however, was still continued, and, under circumstances *over which the writer had no control, he was compelled reluctantly to let the bill drop. Whilst the bill was this session, 1862, in committee in the Lords, the lord chancellor objected that the bill did not define what implied notice was; to meet that objection, the writer introduced the best definition he could frame, which appeared to such little advantage in the bill, that he struck it out at the request of the noble lord who had suggested it. The clause stood thus: "Where a purchaser for valuable consideration or mortgagee, or his solicitor, or agent, shall not have direct notice of any charge, act, matter, or thing, affecting the title to the property purchased or taken in mortgage, he shall not be charged therewith, or made liable thereto, by or through what is termed in law implied or constructive notice, that is, notice or knowledge of some act, fact, instrument, or incumbrance, which he would have discovered if he had made diligent and proper inquiries, founded upon knowledge which he did possess of some other act, fact, instrument, or incumbrance, affecting the property, or founded upon imperfect knowledge which he did possess of the act, fact, instrument, or incumbrance, with which he is sought to be charged, or where he has wholly abstained from making any such inquiry, unless the court, before which the question shall be raised, shall be of opinion that the conduct of such purchaser or mortgagee amounted to fraud, or that the neglect to make any or sufficient inquiry amounted to such wilful neglect, in order to avoid notice, as was equivalent to fraud."

SECTION II.

OF THE PROOF OF NOTICE.

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| <ol style="list-style-type: none"> 1. Not to be proved by counsel, &c. 2. Nor can he produce the purchaser's documents. 3. } 4. } Opinions may be withheld: old cases. 5. Communications to attorney for both parties. | <ol style="list-style-type: none"> ties. — Communications by mistake to person not an attorney, not protected. 6. Attorney a witness must prove deed. — Map. 7. Communications upon sales and purchases protected: advising on title. 8. Purchaser how charged in account. |
|---|--|

1 THE counsel, attorney, or agent of the purchaser cannot be admitted to prove notice, *and this is the privilege of the client*, not of the counsel or attorney; (*a*¹) for it is contrary to the policy of the law *to permit any person to betray a secret with which the law has intrusted him. (*a*)

2. And the rule applies of course to documents left in the hands of an attorney belonging to the client. (*b*) But the at-

(*a*¹) [King v. Barrett, 11 Ohio N. S. 261; Fossler v. Schriber, 38 Ill. 172.]

(*a*) Lindsay v. Talbot, Bul. N. P. 284; Wilson v. Rastall, 4 Term R. 753; 2 Esp. 716; Wright v. Mayer, 6 Ves. 280; Slogan v. Herne, 2 Esp. 695; Robson v. Kemp, 5 Esp. 52; Brand v. Ackerman, 1b. 119; Rex v. Withers, 2 Camp. 578; Parkhurst v. Lowten, 2 Swan. 194; [1 Greenl. Ev. §§ 237-239; Story Eq. Pl. § 599, & note; Gresley Eq. Ev. 378-384; Brown v. Payson, 6 N. H. 443; Wigram Discov. (Am. ed.) 83, 84, pl. 136; Bean v. Quimby, 5 N. H. 94; Pierson v. Steortz, 1 Morris, 136; Crosby v. Berger, 11 Paige, 516; Aiken v. Kilburne, 27 Maine, 252; Bank of Utica v. Mersereau, 3 Barb. Ch. 528; Beeson v. Beeson, 9 Barr, 279; Jenkinson v. The State, 7 Blackf. 465; Benjamin v. Coventry, 19 Wend. 353; Johnson v. Sullivan, 23 Missou. 474; Granger v. Warrington, 3 Gilman, 299; Brazier v. Fortune, 10 Ala. 516; Foster v. Hall, 12 Pick. 89; Jenkins v. Bushby, L. R. 2 Eq. 547; Reid v. Langlois, 1 Mac. & G. (Am. ed.) 627, n. (3), and cases cited; 1 Dan. Ch. Pr. (4th Am. ed.) 571-578; Brayton v. Chase, 3 Wis. 456; Coon v. Swan, 30 Vt.

6; Allen v. Harrison, 30 Vt. 219. An attorney at law, who in his professional character has received from the owner of property, confidential communications on the subject of the transfer of it which is subsequently made, cannot be examined against the consent of the grantee, in relation to such communications. Foster v. Hall, 12 Pick. 89; 1 Greenl. Ev. §§ 237, 239.]

(*b*) Doe v. Seaton, 2 Ad. & El. 171.; Chant v. Brown, 7 Hare, 79; see Banner v. Jackson, 1 De G. & Sm. 472; Volant v. Soyer, 13 C. B. 231; [1 Greenl. Ev. § 241; 2 Dan. Ch. Pr. (4th Am. ed.) 1833, 1834, and cases in note (1); see *Ex parte* Maulsby, 13 Md. 625; People v. Sheriff of New York, 29 Barb. 622. But the attorney may be examined to the fact of the existence of such documents, in order to let in secondary evidence of their contents, which must be from some other source than himself. Wright v. Mayer, 6 Ves. (Sumner's ed.) 280, note (*a*); 1 Greenl. Ev. § 241; Bank of Utica v. Mersereau, 3 Barb. Ch. 528; Anon. 8 Mass. 370; Jackson v. Burtis, 14 John. 391; Dale v. Livingston, 4 Wend. 558; Brandt v. Klein, 17 John. 335;

torney may be compelled to show the indorsement on the back of the deed for the purpose of identifying the instrument.(c) -

3. And a purchaser is not bound to produce any legal opinion which he may have taken.(d) Even cases which have been long before stated for the opinion of counsel, are protected where the subsequent litigation, although with third parties, is respecting the same subject matter, and involves the same question.(e)

4. In a suit by a purchaser for discovery, after a bill by the seller for specific performance, letters written to the solicitor and statements made for the opinion of counsel by the sellers *before* the sale were, although confidential communications in one sense, for the attorney would not have been permitted to disclose them, ordered to be produced by the sellers. But cases relating to the actual sale, the objections taken by the purchaser to the title, the steps taken by the sellers to clear up the objections, and so on, were considered as communications made with reference to the dispute, which resulted in the litigation, and therefore protected. And so as to cases laid before counsel in the progress of the cause with reference to the matters in dispute.(f) But the learned judge who made this decision in a later case yielded to higher authority and refused to order the production of any

Jackson v. McVey, 18 John. 330; Wake-man v. Bailey, 3 Barb. Ch. 482.]

(c) Phelps v. Prew, 3 E. & B. 430. [See Gray v. Fox, 43 Missou. 570; Dietrich v. Mitchell, 43 Ill. 40.]

(d) Nias v. Nor. & East. Rail. Co. 2 Ke. 76; 3 My. & Cr. 355; Bolton v. Corp. of Liverpool, 3 Sim. 483; 1 My. & Ke. 88; Holmes v. Baddeley, 1 Phil. 476; Knight v. Ld. Waterford, 2 Yo. & Col. 37; Storey v. Ld. G. Lennox, 1 Ke. 341, 1 My. & Cr. 525; Wright v. Mayer, 6 Ves. 280; Walker v. Wildman, 6 Mad. 47; but see Radcliffe v. Fursman, 2 Bro. P. C. by T. 514; Richards v. Jackson, 18 Ves. 472; Preston v. Carr, 1 Yo. & Jer. 175; and see 4 Cl. & Fin. 470, 471; Bunbury v. Bunbury, 2 Beav. 173; Combe v. Mayor of London, 1 Yo. & Col. C. C. 631; Price v. Harrison, 6 Jur. N. S. 1345; Manby v. Bewicke, 8 De G., M. & G. 476; Ld. Walsingham v. Goodricke, 3 Hare, 122;

Woods v. Woods, 4 Hare, 83; Pearse v. Pearse, 1 De G. & Sm. 12; Reynell v. Sprye, 10 Beav. 51; Beadon v. King, 17 Sim. 34; Flight v. Robinson, 8 Beav. 22, overruled by Reece v. Try, 9 Beav. 316; Penruddock v. Hammond, 11 Beav. 59; Manser v. Dix, 1 K. & J. 451; see Brown v. Oakshott, 12 Beav. 252, as between trustee and *cestui que trust*. [In Woburn v. Henshaw, 101 Mass. 545, it was held that a party, who offers himself as a witness at a trial, cannot refuse to answer questions as to a conversation with his counsel on the ground that it was a privileged communication. See King v. Barrett, 11 Ohio N. S. 261.]

(e) Holmes v. Baddeley, 6 Beav. 521; 1 Phil. 476; see 3 My. & Cr. 357, 358; Greenlaw v. King, 1 Beav. 137. [See 2 Dan. Ch. Pr. (4th Eng. ed.) 1833, 1834, and cases in note (1).]

(f) Flight v. Robinson, 8 Beav. 22.

cases or opinions prior to the litigation; (g) and the same rule applies to drafts prepared by counsel, and opinions thereon, although all long *ante litem motam*.(h)

5. Where the same attorney is employed for both seller and purchaser, * the privilege is confined to such communications as are made to him by either party in the character of his own attorney only.(i) A communication by mistake to a person not actually an attorney is not protected; (k) and an attorney may give evidence of the time of executing a deed.(l)

6. So, if an attorney put his name to an instrument as a witness, his signature binds him to disclose all that passed at the time respecting the execution of the instrument; but not what took place in the preparation of the deed, or at any other time, and not connected with the execution of it. Every person who claims an interest in the property has a right to call upon the attorney, as being the attesting witness; (m) nor does this privilege extend to communications from collateral quarters, although made to him in consequence of his character of attorney; the privilege

(g) *Reece v. Try*, 9 Beav. 316; see *Pearse v. Pearse*, 1 De G. & Sm. 12; *Penruddock v. Hammond*, 11 Beav. 59.

(h) *Manser v. Dix*, 1 K. & J. 451.

(i) *Parry v. Smith*, 9 M. & W. 681; consider *Warde v. Warde*, 1 Sim. N. S. 18. [See *Hull v. Lyon*, 27 Missou. 570.]

(k) *Fountain v. Young*, 6 Esp. 113; *Bunbury v. Bunbury*, 2 Beav. 173; see *Calley v. Richards*, 19 Beav. 401; [*Sample v. Frost*, 10 Iowa, 266. Any person who overhears a confidential communication between an attorney and his client may testify of it. *Hoy v. Morris*, 13 Gray, 519; *Goddard v. Gardner*, 28 Conn. 172.]

(l) *Ld. Say and Seal's case*, 10 Mod. 41. [See *Crosby v. Berger*, 11 Paige, 377; *Levers v. Van Buskirk*, 4 Barr, 309. An attorney may be compelled to disclose the name of the person by whom he was retained. *Brown v. Payson*, 6 N. H. 443; *Chirac v. Reinicher*, 11 Wheat. 280; *Gowen v. Emery*, 18 Maine, 79; *Wheeler v. Hill*, 16 Maine, 329; see *Stephens v. Mattox*, 37 Geo. 289; *Satterlee v. Bliss*, 36 Cal. 489; the character in which his

client employed him; *Beckwith v. Benner*, 6 C. & P. 681; but see *Chirac v. Reinicker*, 11 Wheat. 280; the time when an instrument was put into his hands, but not its condition and appearance at that time; *Wheatley v. William*, 1 M. & W. 533; *Brown v. Payson*, 6 N. H. 443; his client's handwriting; *Hurd v. Moring*, 1 C. & P. 372; *Johnson v. Davenport*, 19 John. 134; and various other matters, for an enumeration of which, see 1st Greenl. Ev. § 245; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528; *Hunter v. Watson*, 12 Cal. 363. The attorney may be compelled to testify to the terms of a bargain between his client and another person in his presence. *Prouty v. Eaton*, 41 Barb. 409; *Carr v. Weld*, 4 Green (N. J.), 319. So to statements made by his client to other persons, or by other persons to his client, or by other persons to each other in his and his client's presence. *Gallagher v. Williamson*, 23 Cal. 331.]

(m) *Robson v. Kemp*, 5 Esp. 52; *Doe v. Andrews*, Cow. 845; [1 Dan. Ch. Pr. (4th Am. ed.) 575; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528.]

is restricted to communications, whether oral or written, from the client to his attorney,⁽ⁿ⁾ but it is not necessary that a cause should have commenced.^(o) If a map is given to him to show the extent of the property to be sold, it is no longer protected.^(p)

7. The privilege is not limited to communications made in relation to a suit in existence or expected.^(p¹) Communications made in relation to the sale and purchase of estates, reserving a bidding, and other matters connected with the sale, are protected.^(q) So is knowledge acquired in advising on a title. And an attorney in the habit of lending the money of his clients, who peruses the abstract of a borrower with a view to a loan, falls within the rule.^(r)

8. Although a purchaser being fixed with notice may be decreed to account for the rents received by him, yet he will not, like a mortgagee in possession, be made responsible for what, without his default or neglect, he might have received, and he will be entitled to all just allowances. And if by his answer he admit that he has for the time past been in possession or in receipt of the rents, yet he will not be charged with rents not actually received by him.^(s)

(n) *Spenceley v. Schulenburgh*, 7 East, 357; *Knight v. Ld. Waterford*, 2 Yo. & Col. 37; *Bramwell v. Lucas*, 2 B. & C. 745; *Sawyer v. Birchmore*, 3 My. & Ke. 572.

(o) *Clark v. Clark*, 2 Moo. & Mal. 3; *Clagett v. Phillips*, 2 Yo. & Col. C. C. 82.

(p) *Doe v. Ld. Hertford*, 13 Jur. 632, Q. B.

(p¹) [*Foster v. Hall*, 12 Pick. 89, 93 *et seq.*; 1 Greenl. Ev. § 240; *Story Eq. Pl.* § 600; *Wilson v. Troup*, 7 John. Ch. 25, 38, 39; *S. C.* 2 Cowen, 195; *Beltzhoover v. Blackstock*, 3 Watts, 20; *March v. Ludlum*, 3 Sandf. Ch. 35; *Moore v. Bray*, 10 Barr, 519; *Crisler v. Garland*, 11 Sm. & M. 136; *McMannus v. State*, 2 Head (Tenn.), 213; *Marsh v. Howe*, 36 Barb.

649; *Flack v. Neill*, 26 Texas, 273; but see *Whiting v. Barney*, 30 N. Y. 330.]

(q) *Mynn v. Joliffe*, 1 Moo. & Rob. 325; *Taylor v. Blacklow*, 3 Bing. N. C. 235; see *Ld. Walsingham v. Goodricke*, 3 Hare, 122; *Cárpmeal v. Powis*, 1 Phil. 687; *Hawkins v. Gathercole*, 1 Sim. N. S. 150; *Goodall v. Little*, *Ib.* 155. [But communications made to an attorney who is merely employed as scrivener to draw up a deed after the parties have made their contract, are not privileged. *Borum v. Fouts*, 15 Ind. 50; *De Wolf v. Strader*, 26 Ill. 225.]

(r) *Doe v. Watkins*, 3 Bing. N. C. 421; *Herring v. Cloberry*, *Jones v. Pugh*, 1 Phil. 91, 96.

(s) *Howell v. Howell*, 2 My. & Cr. 478.

* CHAPTER XXV.

OF PLEADING A PURCHASE.

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|---|---|
| <ol style="list-style-type: none"> 1. Ground of plea. 3. Must be sworn: answer overruling or supporting plea. 4. Deeds of purchase to be stated. 5. Averment of seisin. 6. And of possession: reversion. 7. And of payment of price. 8. And denial of notice. 9. And particular instances to be denied specially: possession of papers. 10. Where general denial of notice sufficient. 11. Notice to be denied by answer also. 13. Plea no protection where want of due diligence. | <ol style="list-style-type: none"> 14. Decree after an issue and then appeal to Dom. Proc. 15. Plea protects against a legal title. 16. } Review of the authorities as to the 22. } extent of the plea. 18. Decisions that it does not prevail over a legal estate. 19. } 20. } Cases <i>contrà</i>. 21. Attorney General <i>v.</i> Wilkins. 22. Phillips <i>v.</i> Phillips. 23. But relief given to a legal mortgagee. 24. And injunction to prevent the institution of a clerk. |
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1. "SUPPOSING a plaintiff to have a full title to the relief he prays, and the defendant can set up no defence in bar of that title, yet if the defendant has an equal claim to the protection of a court of equity to defend his possession, as the plaintiff has to the assistance of the court to assert his right, the court will not interfere on either side. This is the case where the defendant claims under a purchase for valuable consideration, without notice of the plaintiff's title, which he may plead in bar of the suit." (a)

2. The principle of this plea, Lord Eldon observes, is this: "I have honestly and *bonâ fide* paid for this estate, in order to make myself the owner of it; and you shall have no information from me as to the perfection or imperfection of my title until you deliver me from the peril in which you state I have placed myself in the article of purchasing *bonâ fide*." (b)

(a) Mitf. Plead. (2d ed.) p. 215; Gough *v.* Stedman, Finch, 208; Purcell *v.* Kelly, Beat. 493; [Story Eq. Pl. §§ 604 a, 805; Wood *v.* Mann, 1 Sumner, 506, 507, 508; High *v.* Batte, 10 Yerger, 335; Donnell *v.* King, 7 Leigh, 393; Jewett *v.* Palmer, 7 John. Ch. 65; Gallatian *v.* Cunningham, 8

Cowen, 361; Souzer *v.* De Meyer, 2 Paige, 574; 1 Dan. Ch. Pr. (4th Am. ed.) 611, 613, 674-679, & notes.]

(b) Wallwyn *v.* Lee, 9 Ves. 24; Ld. Raneliffe *v.* Parkyns, 6 Dow, 230. [The protection which equity throws around an innocent purchaser, applies not only to

3. This plea is a peremptory plea, and must be sworn by the pleader.(c) It must be put in *ante litem contestatam*, because it is a plea why an answer should not be put in; and, therefore, if a defendant answers to anything to which he may plead, he overrules his plea,(d) but he may answer anything *in subsidium* of his plea, as he may deny notice in his answer, which he may deny also in his plea; because that is not putting anything to issue, which he should cover by his plea from being put in issue, but it is adding, by way * of answer, that which will support his plea, and not an answer to a charge in the bill, which by the plea he would decline. But the purchaser must protect himself by plea, for if he answer he is bound to answer fully; (e) if he neglect to plead it, he cannot avail himself of it as a defence.(f)

4. The plea must state the deeds of purchase, setting forth the dates, parties; and contents briefly, *and the time of their execution*, for that is the peremptory matter in bar.(g)

5. It must aver that the vendor was seised, or pretended to be seised, at the time he executed the conveyance.(h) In *Carter v.*

bills of relief, but also to bills of discovery. 2 Story Eq. Jur. § 1502. Equity will not take the least step against him, and will allow him to take every advantage which the law gives him; for there is nothing which can attach itself upon his conscience, in such a case, in favor of an adverse claim. 2 Story Eq. Jur. § 1503; 1 *Id.* § 410; *Wood v. Mann*, 1 Sumner, 506; *McNiel v. Magee*, 5 Mason, 269; *Vattier v. Hinde*, 7 Peters (U. S.), 252; *Fitzsimmons v. Ogden*, 7 Cranch, 2; *Boone v. Chiles*, 10 Peters (U. S.), 177; *Story Eq. Pl.* § 603.]

(c) *Marshall v. Frank*, Pre. C. 480.

(d) *Richardson v. Mitchell*, Sel. C. C. 51; *Blacket v. Langlands*, 1 Ans. 14.

(e) *Gilb. For. Rom.* 58; *Hoare v. Parker*, 1 Bro. C. C. 573; *Ovey v. Leighton*, 2 Sim. & Stu. 234; *Ld. Portarlington v. Soulby*, 6 Sim. 356; see now the orders of 1841; [*Story Eq. Pl.* §§ 605, 606, 846, 847; *Bank of Utica v. Mersereau*, 7 Paige, 517, 520; 1 *Dan. Ch. Pr.* (4th Am. ed.) 720 *et seq.* & notes. The supreme court of the United States, by rule in equity, promulgated at the January term, 1844, have

materially altered the general doctrine. The thirty-ninth rule, among other matters, provides that a "*bonâ fide* purchaser for a valuable consideration, without notice, may set up that defence by way of answer instead of plea, and shall be entitled to the same protection; and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea." *Story Eq. Pl.* § 847, in note.]

(f) *Phillips v. Phillips*, 7 Jur. N. S. 1094; 8 Jur. N. S. 145.

(g) *Gilb. For. Rom.* 58; *Aston v. Aston*, 3 Atk. 302; 2 Ves. 107, 396; *Wallwyn v. Lee*, 9 Ves. 24; and *qu. Anon.* 2 Ch. C. 101; *Day v. Arundel*, Hard. 510; *Watkins v. Hatchet*, 1 Eq. Ca. Ab. 33. [A party who takes his title under a deed of quitclaim simply, was held, in *May v. Le Claire*, 11 Wallace, 217, not entitled to be regarded as a *bonâ fide* purchaser for value.]

(h) *Story v. Ld. Windsor*, 2 Atk. 630; *Head v. Egerton*, 3 P. Wms. 279; 17 Ves. 290; *Jackson v. Roe*, 4 Russ. 514; [*Craig v. Leiper*, 2 Yerger, 193; *Snelgrove v.*

Pritchard,(i) it was held that the plea of a purchase without notice must aver the defendant's *belief* that the person from whom he purchased was seised in fee. If it be charged in the bill that the vendor was only tenant for life, or tenant in tail, and a discovery of the title be prayed, such a discovery cannot be covered, unless a seisin is sworn in the manner already mentioned, or that such fines and recoveries were levied and suffered as would bar an entail if the vendor was tenant in tail; for if a purchase by lease and release should be set forth, which would pass no more from the tenant in tail than it lawfully may pass, and that is only an estate for the life of the tenant in tail,(1) then there is no bar against the issue.(j) Where, however, a fine was pleaded, the plea must have averred an *actual* seisin of a freehold in the vendor, and not that he was seised, or pretended to be seised.(k)

6. If the conveyance pleaded be of an estate in possession, the plea must aver that the vendor was in possession at the time of the execution of the conveyance.(l) And if it be of a particular estate, and not in possession, it must set out how the vendor became entitled to the reversion.(m) But although a bill be brought by an heir, *the plea need not, on that account, aver the purchase to be from the plaintiff's ancestor.(n)

7. The plea must also distinctly aver that the consideration money mentioned in the deed was *bonâ fide* and truly paid,(o) independently of the recital of the purchase deed; (p) for if the

Snelgrove, 4 Desaus. 287; Lanesborough v. Kilmaine, 2 Mol. 403.]

(i) 2 Vivian's MS. Rep. 90, Lincoln's Inn Library; Jackson v. Rowe, 4 Rus. 514.

(j) Gilb. For. Rom. 57.

(k) Story v. Ld. Windsor, 2 Atk. 360; Page v. Lever, 2 Ves. jr. 450; Dobson v. Leadbeater, 13 Ves. 230.

(l) Trevanian v. Mosse, 1 Ver. 246; 3 Ves. 32, 226; Lady Lanesborough v. Ld. Kilmaine, 2 Mol. 403; see Ogilvie v. Jeafreson, 2 Giff. 353.

(m) Hughes v. Garth, Amb. 421.

(n) Seymour v. Nosworth, 2 Free. 128; 3 Ch. R. 23; Nels. C. R. 135.

(o) Moor v. Mayhow, 1 Ch. C. 34; 2 Atk. 241; Molony v. Kernan, 2 Dru. & War. 31; [Story Eq. Pl. § 805; Jewett v. Palmer, 7 John. Ch. 65; High v. Batte, 10 Yerger, 335; Donnell v. King, 7 Leigh, 393; Snelgrove v. Snelgrove, 4 Desaus. 287; Wells v. Morrow, 38 Ala. 125.]

(p) Maitland v. Wilson, 3 Atk. 814; [Mitchell v. Puckett, 23 Texas, 573.]

(1) This is the doctrine of Littleton, with which it seems, Gilbert agreed; but since Littleton's time it has been held that the releasee has a base fee determinable by the entry or action of the issue. Butler's n. (1) Co. Litt. 331 a, and the authorities there referred to. But now estates tail may be barred by deed, 3 & 4 Will. 4, c. 74.

money be not paid, the plea will be overruled, *(q)* as the purchaser is entitled to relief against payment of it. The particular consideration must, it should seem, be stated, *(r)* although this point has been decided otherwise. *(s)* There can, however, be no objection to state the consideration, as, if it be valuable, the plea will not be invalidated by mere inadequacy. *(t)* The question is not whether the consideration is adequate, but whether it is valuable; *(t¹)* for if it be such a consideration as will not be deemed fraudulent within the statute of 27th Elizabeth, or is not merely nominal, *(u)* or the purchase is such a one as would hinder a *puisne* purchaser from overturning it, it ought not to be impeached in equity.

8. The plea must also deny notice of the plaintiff's title or claim *(x)* previously to the execution of the deeds and payment of the purchase money; *(y)* for till then the transaction is not complete; and therefore, if the purchaser have notice previously to that time, he will be bound by it. *(y¹)* And the notice so denied must be notice of the existence of the plaintiff's title, and not merely notice of the existence of a person who could claim under that title. *(z)* But a denial of notice at the time of making the purchase, and paying the purchase money, is good; *(z¹)*

(q) Hardingham v. Nicholls, 3 Atk. 304.

(r) Millard's case, 2 Free. 43; Snag's case, *Ib.*; Wagstaff v. Read, 2 Ch. C. 156. [See High v. Batte, 10 Yerger, 335; Donnell v. King, 7 Leigh, 393.]

(s) Moor v. Mayhow, 1 Ch. C. 34; Day v. Arundel, Hard. 510.

(t) Bassett v. Nosworthy, Finch. 102; Mildmay v. Mildmay, Amb. 767; Bullock v. Sadlier, Amb. 764.

(t¹) [*Ante*, 713.]

(u) Moor v. Mayhow, 1 Ch. C. 34; Wagstaff v. Read, 2 Ch. C. 156.

(x) Lady Bodmin v. Vendybandy, 1 Ver. 179; Anon. 2 Vent. 361, No. 2; [Cummings v. Coleman, 7 Rich. Eq. 509.]

(y) Moor v. Mayhow, 1 Ch. C. 34; Story v. Ld. Windsor, 2 Atk. 630; Atty. Gen. v. Gower, 2 Eq. Ca. Ab. 685.

(y¹) [*Ante*, 752, 753, & notes; Jewett v. Palmer, 7 John. Ch. 65; Wood v. Mann, 1 Sumner, 506; Wilson v. Hillyer, 1 Sax-

ton (N. J.), 63; Pillow v. Shannon, 3 Yerger, 508; Frost v. Beekman, 1 John. Ch. 288, 301; Gordon v. Rockafellow, Halst. Dig. 169; Murray v. Ballou, 1 John. Ch. 566; Heatley v. Finster, 2 John. Ch. 158; Murray v. Finster, 2 John. Ch. 155; M'Gahee v. Sneed, 1 Dev. & Bat. 333; Ellis v. Woods, 9 Rich. Eq. 19; Williams v. Hollingsworth, 1 Strobb. Eq. 103; Boone v. Chiles, 10 Peters (U. S.), 177, 211, 212; De Mott v. Starkey, 3 Barb. Ch. 403; Story Eq. Pl. § 806; Nantz v. McPherson, 7 Monroe, 599; High v. Batte, 10 Yerger, 385; Aiken v. Smith, 1 Sneed (Tenn.), 304.]

(z) Kelsall v. Bennett, 1 Atk. 522; which overruled Brampton v. Barker, 2 Ver. 159.

(z¹) [See Snelgrove v. Snelgrove, 4 De-saus. 287; Murray v. Finster, 2 John. Ch. 155, 157.]

and notice *before* the purchase need not be denied, because notice before is notice at the time of the purchase, and the party will in such case, on its being proved that he had notice before, be liable to be convicted of perjury.(a)

9. The notice must be positively and not evasively denied,(b) and must be denied whether it be or be not charged by the bill.(c) If particular instances of notice or circumstances of fraud are charged, * the facts from which they are inferred must be denied as specially and particularly as charged.(d) So if the bill charges that the purchaser has in his possession certain papers and documents, whence it will appear that his was not a purchase without notice, the defendant is bound to support his plea by an answer to that charge.(e)

10. But he need only by this plea deny notice generally,(f) unless where facts are specially charged in the bill as evidence of notice.(g).

11. Notice must also be denied by answer, for that is matter of fraud, and cannot be covered by the plea,(g¹) because the

(a) *Jones v. Thomas*, 3 P. Wms. 243.

(b) *Cason v. Round*, Pre. C. 226; 2 Eq. Ca. Ab. 682, (D), n. (b).

(c) *Aston v. Curzon*, *Weston v. Berkeley*, 3 P. Wms. 244, n. (f); 6th resol. *Brace v. Duchess of Marlborough*, 2 P. Wms. 491; *Hughes v. Garner*, 2 Yo. & Col. 328; [*Lowry v. Tew*, 3 Barb. Ch. 407.]

(d) *Meder v. Birt*, Gilb. E. R. 185; *Radford v. Wilson*, 3 Atk. 815; *Jerrard v. Saunders*, 2 Ves. jr. 187; 4 Bro. C. C. 322; 6 Dow, 230; *Foley v. Hill*, 3 My. & Cra. 478; [*Balcom v. New York Life Ins. & Trust Co.* 11 Paige, 454; *Lowry v. Tew*, 3 Barb. Ch. 407; *Frost v. Beekman*, 1 John. Ch. 298; *Manhattan Co. v. Evertson*, 6 Paige, 457; *Denning v. Smith*, 3 John. Ch. 332, 345; *Murray v. Ballou*, 1 John. Ch. 566; *Murray v. Finster*, 2 John. Ch. 155; *Galatian v. Erwin*, 1 Hopk. 48; *Wilson v. Hillyer*, 1 Saxton (N. J.), 63; *Pillow v. Shannon*, 3 Yerger, 508; *Snelgrove v. Snelgrove*, 4 Desaus. 287.]

(e) *Hardman v. Ellames*, 5 Sim. 650;

2 My. & Ke. 732; see since the former orders, *Gordon v. Shaw*, 14 Sim. 393.

(f) *Ovey v. Leighton*, 2 Sim. & Stu. 234.

(g) *Pennington v. Beechey*, 2 Sim. & Stu. 282; *Thring v. Edgar*, 2 Sim. & Stu. 274; [*Griffith v. Griffith*, 1 Hoff. Ch. 163.]

(g¹) [Care must be taken, in case of a plea of a purchase for a valuable consideration without notice, not to make an answer to any statements in the bill actually and properly covered by the plea; for notwithstanding some doubts formerly entertained, it seems now established that in such a case, if the defendant answer at all to the matters covered by the plea, he must answer fully; and if he puts in a general answer, he cannot protect himself by such a defence in his answer from answering fully. Story Eq. Pl. § 606, & note & cases cited, § 810, & note. The Thirty-ninth Equity Rule of the United States courts gives to such a person the right to protect himself by answer, as he might by plea. Story Eq. Pl. § 846, note, § 847, note.]

plaintiff must have an opportunity to except to its sufficiency if he think fit; (*h*) but it must also be denied by the plea, because otherwise there is not a complete plea in court on which the plaintiff may take issue. (*i*)

12. Although a purchaser omit to deny notice by answer, he will be allowed to put in the point of notice by way of answer, (*k*) and the omission will not invalidate his plea, if it is denied by that. (*l*) If notice is omitted to be denied by the plea, and the *plaintiff reply to it*, the defendant has then only to prove his purchase, and it is not material if the plaintiff do prove notice, as he has waived setting down the plea for argument, in which case it would have been overruled. (*m*) If, however, a bill is exhibited against a purchaser, and he plead his purchase, and the bill is thereupon dismissed, a new bill will lie charging notice, if the point of notice was not charged in the former bill, or examined to; and the former proceedings cannot be pleaded in bar. (*n*) But if notice is neither alleged by the bill nor proved, and the defendant by his answer deny notice, an inquiry will not be granted for the purpose of affecting him with notice. (*o*)

13. A plea of a purchase for valuable consideration without notice, will not be allowed where the purchaser might by due diligence have ascertained the real state of the title. (*p*)

14. If a purchaser's plea of valuable consideration without notice be falsified by a verdict at law, and thereupon a decree is made against the purchaser, and he then carries an appeal to the House of Lords, it will be dismissed, and the decree affirmed without further inquiry. (*q*)

* 15. The title of a purchaser for valuable consideration with-

(*h*) Anon. 2 Ch. C. 161; Price *v.* Price, 1 Ver. 185.

(*i*) Harris *v.* Ingledew, 3 P. Wms. 91; Meadows *v.* Duchess of Kingston, Mitf. Plead. (2d ed.) 216, n.

(*k*) Anon. 2 Ch. C. 161.

(*l*) Coke *v.* Wilcocks, Mose, 73.

(*m*) Harris *v.* Ingledew, 3 P. Wms. 91; Eyre *v.* Dolphin, 2 Bal. & Beat. 102.

(*n*) Williams *v.* Williams, 1 Ch. C. 2.

(*o*) Hardy *v.* Reeves, 5 Ves. 426.

(*p*) Jackson *v.* Rowe, 2 Sim. & Stu.

472, heard upon appeal; Hamilton *v.* Lyster, 7 Ir. E. R. 560. [If a party means to defend himself on the ground that he was a *bonâ fide* purchaser for a valuable consideration without notice, he must deny the fact of notice, and of every circumstance from which it can be inferred. Murray *v.* Ballou, 1 John. Ch. 575; Balcom *v.* New York Life Ins. & Trust Co. 11 Paige, 454.]

(*q*) Lewis *v.* Fielding, Coll. P. C. 361.

out notice is a shield to defend the possession of the purchaser,^(r) not a sword to attack the possession of others.^(s)

16. In the present state of the law in regard to the force of the plea of a purchase without notice as a defence, it is necessary to review the authorities more at large than was attempted in the last edition of this work, although the writer considers the condensed statement there to be an accurate representation of the law according to the authorities. We have already had occasion to consider the protection which a court of equity gives to *bonâ fide* purchasers without notice.^(t) It seemed to the writer to be settled, after much previous conflict of opinion, that the plea would prevail against a legal as well as an equitable claim. Upon principle this would seem to be clear.^(t¹) Equity may not be able to interfere with the legal estate in favor of a purchaser, but still it will allow him to defend himself against a claim under it. It will not assist the legal claimant against the purchaser without notice. *It regards not the quality of the estate, but the character of the person.* In the great majority of cases the purchaser has only an equitable estate, in some no actual estate. The question has generally arisen under the old law, where the legal owner was driven into equity to seek a discovery of deeds in aid of his legal title. The earliest authorities were decided by Lord Nottingham. The first case (1673), always referred to, is *Bassett v. Nosworthy*,^(u) which is well reported.

(r) *Patterson v. Slaughter*, Amb. 292.

(s) 3 Ves. 225.

(t) Ch. 23, s. 1, *supra*.

(t¹) [1 Dan. Ch. Pr. (4th Am. ed.) 675, & note (7); *Wood v. Mann*, 2 Sumner, 507. "The point of doubt," says Mr. Justice Story, "has been, whether the defence ought to apply to a case, where the plaintiff founds his bill upon a legal title, seeking to support it by a discovery, and the defendant relies solely on an equitable title to protect himself from the discovery. Upon this point the authorities are at variance; but upon principle, it would seem difficult to resist the reasoning by which the doctrine, that the purchaser is in such a case entitled to protection is supported." Story Eq. Pl. § 604 a; see *Snelgrove v.*

Snelgrove, 4 Desaus. 288, where this point is fully examined, and the chancellor (Desaussure) remarks: "It should be remembered, that the plea protects, by the court refusing to aid the plaintiff in setting up a title. Now when the title attempted to be set up is an equitable one, it seems very reasonable that the court should forbear to give its assistance in setting up such equitable title against another title set up by a fair purchaser. But when the plaintiff comes with a legal title, I do not see how he can be refused the aid of the court." See, also, *Larrowe v. Beame*, 10 Ohio, 498.]

(u) *Finch*, 102; *Seymer v. Nosworthy*, 2 Freem. 128, is another instance of Lord

Lord Nottingham, then lord keeper, overruled the decision of Lord Keeper Bridgman. It was the simple case of a bill for discovery by an heir at law against a purchaser claiming under a conveyance from devisees of one of the ancestors under whom the plaintiff claimed, and he alleged that the will had been revoked; the defendant pleaded that he was a purchaser for a valuable consideration *bonâ fide* without notice of any revocation. The plaintiff's title, therefore, was strictly at law, and he claimed relief against the purchaser, who, of course, in his view, had no title, legal or equitable. The lord keeper stated the settled rules of equity in favor of purchasers, and the plea being proved, he allowed the plea, and dismissed the bill. Lord Rosslyn, in giving judgment in *Jerrard v. Saunders*,^(x) relied upon the authority of *Bassett v. Nosworthy*. In a later case (1677), Lord Nottingham exactly followed his former decision, although the plaintiff as heir had *primâ facie* the legal title,^(y) and he appears^(z) to have retained * this opinion at a later period (1678). Thus the point rested till 1681, when, according to Freeman, in the case of *Rogers v. Searle*,^(a) Lord Nottingham, without referring to his former decisions, decided in direct opposition to them. The bill was for a discovery. The plaintiff claimed under a will in 1659. The purchaser claimed under a conveyance from the devisor sixteen years later than the will, and pleaded his purchase properly, and the plea was, according to the report, overruled with this difference: where the plaintiff hath a title in law, there, though the defendant doth purchase without notice, yet he shall discover writings, but otherwise it is, if the plaintiff hath only a title in equity, for there, if the purchaser purchased without notice, he shall never discover nor make good the plaintiff's title. The distinction is clear enough, but no reason is given in support of it, or of the lord chancellor's change of opinion. The purchaser's defence as against an equitable title, however, was not only not doubted, but was distinctly asserted. Lord Rosslyn, in considering these cases, said it was impossible that *Rogers v. Searle* could be the determination of Lord Nottingham; it was

Nottingham overruling Lord Keeper (z) Millard's case, 2 Freem. 43, and
Bridgman, upon the plea of purchase. Suag's case there cited.

(x) 2 Ves. jr. 457.

(a) 2 Freem. 83.

(y) *Burlace v. Cook*, Freem. 24.

directly contrary to what he laid down soon after he got the great seal.(b)

17. Lord Nottingham's decisions in the earlier cases were authorized by the case of *Sherly v. Fagg* (c) in 1666, decided by Lord Chancellor Clarendon, Chief Justice Bridgman, and Judge Archer. The bill was for a discovery, and the plaintiff set forth a clear legal title under a settlement. The defendant pleaded a purchase for valuable consideration, and "upon long debate after a case stated," the whole court was of opinion that the plea was good. And this was followed, in 1695, in *Parker v. Blythmore*,(d) where the master of the rolls thought that such a plea was good against a legal title in the plaintiff under a lost deed.

18. Thus the point rested until the case of *Williams v. Lambe*,(e) before Lord Thurlow, where he overruled the plea to a demand for dower; he thought that where the party is pursuing a legal title, as dower is, that plea did not apply, *it being only a bar to an equitable*, not to a legal claim. No authority was cited nor any reason given for the distinction. But the case might, perhaps, be supported on its own circumstances; for, as the law then stood, if a married woman was dowable out of her husband's estate, he could not bar her right, and a purchaser must therefore take the estate *cum onere*, and was bound to inquire. In an earlier case,(f) in which a bill was filed to obtain some plate unlawfully pledged by a deceased tenant * for life, against the pawnbrokers, who pleaded themselves purchasers without notice, the plea was overruled on a technical ground; but Lord Thurlow said that he could not see any room to make a distinction between the cases of a discovery being sought for the title of the purchaser, and a discovery of the specific things in his possession; but the same rule must apply to both, namely, that a purchaser without notice and for a valuable consideration is not bound in conscience to *assist the right owner in the legal recovery* of the subject purchased under such circumstances. The decision in *Williams v. Lambe* was followed by Sir John

(b) 2 Ves. jr. 457.

(c) 1 Ch. Cas. 68; see 1 Ver. 52.

(d) 2 Eq. Ca. Ab. 79, Pre. Ch. 58.

(e) 3 Bro. C. C. 264; see *Gomm v.*

Parrott, 3 Jur. N. S. 1150; *Corry v. Cremorne*, 12 Ir. Ch. Rep. 136.

(f) *Hoare v. Parker*, 1 Bro. C. C. 578.

Leach at the rolls in *Collins v. Archer*,^(g) which was a case of tithes, but in which the very point arose, for at the time when such charges were valid, the plaintiff claimed under a demise of the rectory to secure a rentcharge, and the defendant claimed under a later demise of the tithes of part of the lands, and pleaded that he was a *bonâ fide* purchaser without notice. The master of the rolls shortly observed, that, following the case of *Williams v. Lambe*, and the general principles of a court of equity, he was of opinion that that defence was of no avail against a legal title. This is not a satisfactory mode of dealing with such a question.^(h)

19. Previously to the decision at the rolls there were several cases of great authority upon this question, to which no reference was made. In *Jerrard v. Saunders*, already referred to, the defence of a purchase without notice prevailed over a claim to a leasehold estate under a settlement, after a review by Lord Rosslyn of the cases before Lord Nottingham. He believed it was decided that against a purchaser for valuable consideration without notice, the court will not take the least step imaginable. The doctrine as to the jurisdiction of the court was this: you cannot attach upon the conscience of the party any demand whatever where he stands as a purchaser having paid his money, and he denies all notice of the circumstances set up by the bill. He took, I may observe, no distinction between legal and equitable estates.

20. But in a later case,⁽ⁱ⁾ Lord Rosslyn drew a distinction, and disallowed the plea in effect to a bill for a discovery by a tenant for life in possession, under a settlement against a mortgagee in fee, claiming under a deed executed after the settlement by the settlor, the first tenant for life, and of course by the plea, relying on his character as a *bonâ fide* purchaser without notice. The L. C. thought the case was an exception out of the general rule, for the plaintiff was in possession, and required the deeds to support his title, and the defendant had no possession to support, but he did not * refer his decision to the fact that the plain-

(g) 1 Rus. & My. 284; see *Gait v. Osbaldeston*, 5 Mad. 428; 1 Russ. 158.

ners in *Medlicott v. O'Donel*, 1 Bal. & Beat. 171.

(h) *Williams v. Lambe* does not seem to have been relied upon by Lord Man-

(i) *Strode v. Blackburne*, 3 Ves. 221.

tiff's was a legal right. This decision was thought to be so directly opposed to the settled rule, that the *same point* was brought before Lord Eldon in *Wallwyn v. Lee*,^(k) and after full consideration he overruled *Strode v. Blackburne*, and admitted the plea. The case was well calculated to try the rule. Lord Eldon referred to the *legal rights* of the son in that case under the settlement; he asked whether it was not worth consideration whether every plea of purchase for valuable consideration, without notice, does not admit that the defendant has no title. The principle of the plea, he said, was this: "I have honestly and *bonâ fide* paid for this in order to make myself the owner of it, and you shall have no information from me as to the perfection or imperfection of my title, until you deliver me from the peril in which you state I have placed myself in the article of purchasing *bonâ fide*." Not an expression fell from him in favor of a legal title prevailing against the plea; indeed, if such had been his opinion, the decision would have been against the plea on that ground. The cases before Lord Rosslyn and Lord Eldon prove that the supposed rule, that the plea cannot avail against the legal title, was not deemed the law of the court. The question once more called for a decision in Ireland, in 1845. The chancellor considered the true rule to be, that the defence of a purchase for value, without notice, was a shield as well against a legal as an equitable title, and, notwithstanding the legal title of the plaintiff, he of course followed the decision of Lord Eldon in *Wallwyn v. Lee*.^(l) In a case in the exchequer, in 1837, Lord Abinger C. B. expressed an opinion, that if a man were a purchaser for a valuable consideration without notice, that would protect him against any claim by the owner of the legal estate; ^(m) and following these authorities, it has been held at law, that in an action of dower, where the purchase deed was in the possession of the purchaser, who had no notice of the dower, the demandant could not compel the production of the deed.⁽ⁿ⁾

21. In the case of the Attorney General *v. Wilkins* ^(o) the

(k) 9 Ves. 24.

1 J. & L. 263; *Hope v. Liddell*, 21 Beav.

(l) *Joyce v. De Moleyns*, 1 J. & L. 183, 2 Jur. N. S. 105.
374; see *Frazer v. Jones*, 5 Hare, 475; 12 (m) *Payne v. Compton*, 2 Yo. & Col.
Jur. 443, on appeal; *Stackhouse v. Lady* 457.

Jersey, 1 J. & H. 721; *Bowen v. Evans*,
(n) *Gomm v. Parrott*, 3 Jur. N. S. 1150.
(o) 17 Beav. 285 (1853).

point once more came before the court. The attorney general, at the relation of others, claiming for a charity a legal rent-charge, the legal estate in which was outstanding, but which could have been got in under the acts of parliament, filed an information and bill for relief against the owner of the land, who by his answer relied upon his title as a *bonâ fide* purchaser without notice, and his defence was supported by the master of the rolls, who observed that the information * was filed to enforce a legal right to a rentcharge,* and the defence set up was, a purchase for valuable consideration without notice, though it was not formally pleaded, and he was of opinion that this defence was a good defence to the bill. Though the earlier authorities were certainly contradictory, yet the later decisions were very strong upon this point, and he thought upon principle that it was but reasonable that it should prevail. This defence was the mere creature of a court of equity and did not exist at law; and the learned judge explained the distinction, referring to what was expressed by Lord Eldon in *Wallwyn v. Lee*, and also what was said in *Joyce v. De Moleyns*. But he added, that it was said that the proposition must be confined within these limits, namely, that the court will afford assistance against a purchaser for value, when the claim made against him is a legal, and not an equitable claim. He was unable to see why the rule should be limited only to cases where the right is merely equitable, and not be extended to the cases where it is legal. He did not concur in the observations made in *Collins v. Archer*, and referred with approbation to *Penny v. Watts*.(p) After referring to *Wallwyn v. Lee* and *Joyce v. De Moleyns* as express determinations on the question, he observed, that the principle was this, that when you once establish that a person is a purchaser for value without notice, the court will give no assistance against him, but the right must be enforced at law. In this case the defendant had not bought the rentcharge, but he bought the estate, believing he was buying it without any rentcharge upon it. If, therefore, the plaintiffs had a legal right they must enforce it at law.(1) This, therefore, was a deliberate well considered judg-

(p) 1 Mac. & G. 150; 2 De G. & Sm. 501, *infra*.

(1) There is a clerical error in the Report, p. 293; the statement as to the first class of cases requires the introduction of the word "not" before "a good defence," &c.

ment following the previous cases. In a case which came before the same learned judge a year later, and to which our attention will presently be called,^(q) he observed that he certainly did not intend to disturb the doctrine of the court with respect to purchasers for valuable consideration without notice. He acted on it in the *Attorney General v. Wilkins*, and following *Wallwyn v. Lee* and *Joyce v. De Moleyns*, he held that the defence of being a purchaser for valuable consideration without notice did apply in cases of persons not having the legal estate. He had no doubt of the propriety of those decisions, nor did he at all consider that the court would interfere and enforce that which is a legal right, as well as an equitable right against a purchaser for valuable consideration without notice. This, therefore, not simply left the decision in the *Attorney * General v. Wilkins* untouched, but it was strengthened by the master of the rolls' confirmation of his opinion after further consideration. And in a case two years later, he observed that the defendant there said that he was a purchaser for valuable consideration without notice. If he were, he (the master of the rolls) had already held that such a defence is applicable to equitable as well as to legal titles upon the authority of a case decided by Lord St. Leonards.^(r) In a case, however, just decided by the lord chancellor, he observed, in reference to the *Attorney General v. Wilkins*, "that he undoubtedly was struck very much with the novel extent of the doctrine that was thus advanced; he could not assent to some observations which he found attributed to the master of the rolls in the report of the *Attorney General v. Wilkins*, but to the decision of that case as explained by his honor in the subsequent case of *Colyer v. Finch* he saw no reasonable objection, and the principles that he (the L. C.) had been referring to in his judgment, were fully explained and acted upon by the master of the rolls. It was impossible, therefore, to suppose that he intended to lay down anything in the case of the *Attorney General v. Wilkins*, which was at variance with the ordinary rules of the court as he (the L. C.) had explained them, or which could give countenance to the argument that had been raised before him at the bar." The argument, we may observe,

^(q) *Finch v. Shaw*, *Colyer v. Finch*, 19 Beav. 300, *infra*; [5 H. L. Cas. 920.] ^(r) *Lane v. Jackson*, 20 Beav. 539.

was that the plea of a purchase without notice, was valid against either a legal or equitable claimant. The master of the rolls decided the case of the Attorney General *v.* Wilkins upon the distinct point that the plea was a good defence; and he maintained the same doctrine unqualifiedly in the later case before him, following, as he considered, former judgments on the same point.

22. The case referred to before the lord chancellor is Phillips *v.* Phillips.^(s) The plaintiff claimed a rentcharge out of land secured by powers of distress and entry, but which was not to arise until the death of a party who lived for some years; but although no payment had been made of the annuity, it was not barred by the statute of limitations. The defendants claimed as purchasers without notice under a marriage settlement subsequently executed by the grantor of the annuity without noticing the grant. It was admitted that the legal estate was outstanding in certain incumbrancers at the time of the grant, and was still outstanding. The case, therefore, was not distinguishable from the Attorney General *v.* Wilkins, except that as the legal fee was outstanding, and the plaintiff could not require a conveyance of it, the estates might be treated as equitable only; which distinction does not seem favorable to the plaintiff, for the doubt has never been whether the plea will not afford a good defence against an equitable estate — that has *always been admitted — but whether it could be used as a defence against a legal estate. The defence in this case was not properly set up, and therefore could not avail. The court was not called upon to decide the point, but the lord chancellor entered at large upon the general question — he relied upon the proposition that every conveyance of an equitable estate is an innocent conveyance, and only passes that to which the grantor is justly entitled, and therefore the claimants under the marriage settlement took subject to the rentcharge, and the rule *qui prior est tempore potior est jure* must prevail; and in regard to the cases, he referred to Bassett *v.* Nosworthy and Wallwyn *v.* Lee, where no assistance was given to the legal title. But this rule, the lord chancellor added, did not apply *where the court exercises a legal jurisdiction concurrently with the courts of law*, and for this ground he re-

(s) 3 Giff. 200; 8 Jur. N. S. 145.

ferred to *Williams v. Lambe* and *Collins v. Archer*. In those cases a court of equity was not asked to give to the plaintiff any equitable as distinguishable from legal relief; he had no difficulty, therefore, in holding that the plea of purchase for valuable consideration was upon principle not at all applicable to the case before him: It will be observed, that the decisions in *Williams v. Lambe* and *Collins v. Archer*, were not made on the ground now suggested, and it would be difficult to maintain that distinction, for the established rule is that equity will give no relief against a purchaser without notice, not even, as Lord Nottingham put it, to one purchaser against another. In cases like *Attorney General v. Wilkins* and *Phillips v. Phillips*, it is not a question of settling priorities, but of affording relief in a contest between adverse equitable claimants, and such adverse claims constantly occur. The question was, whether the subsequent purchaser was to be charged with the prior rentcharge. Treating the latter as a legal estate, it was insisted that the bar was inoperative against it; but that ground was overruled, and the appellant court in *Phillips v. Phillips* seemed to approve of that view. But then the legal estate being outstanding, and the estates of the litigants being therefore equitable, the court was of opinion that the plea was unavailable. Why? Because every grantee of an equitable estate takes only what the grantor had left in him to grant—no doubt; but such, also, is the case with legal grants, and it is because the extent of interest paid for has not passed to the grantee, the purchaser, that courts of equity refuse any relief against him. It is not because he has any estate; for if he have none, relief would equally be denied against him. When we speak of a purchaser's plea being a protection against a legal estate, of course we mean not a dry legal estate, but a legal estate united with the equitable interest, and yet, as we have seen, the plea will prevail against it. *A fortiori* the plea must be a * defence against an equitable estate not covered by the legal estate. Equity looks only at the substance. Whether the grantee, the claimant, has the legal and equitable interest, or only the latter, does not affect the question in equity. In either case he is the beneficial owner, and it matters not whether he is clothed or not with the legal interest. But when as owner, whether with or without the legal estate,

he seeks equitable relief against a subsequent purchaser without notice, it is a contest of right between them, and equity refuses to interfere against the purchaser without notice. Having the legal estate is no merit in the plaintiff; the plaintiff and defendant are rival owners. In *Penny v. Watts*,^(t) V. C. Knight Bruce considered that the plea would prevail, although the legal estate was outstanding in mortgagees. This is intelligible, and seems to be the principle of the authorities which have established that the defence must prevail against both legal and equitable claimants. In most cases if the purchaser had the legal estate he would require no protection. Till the case of *Phillips v. Phillips* the validity of the defence against an equitable title appears not to have been questioned.

23. In a case (*u*) already referred to, where a legal mortgagee filed a bill of foreclosure against a purchaser without notice, the master of the rolls, not meaning, as we have seen, to disturb the doctrine of equity with respect to purchasers for value without notice, or to deny that the title of the latter could be used against a legal title, held that a legal mortgagee is entitled to enforce his equitable remedy incidental to his security against a subsequent purchaser or mortgagee, without notice,^(x) and this has been affirmed in D. P. Yet no doubt the decree gave equitable relief against such a purchaser. Still this case, which is now law, may well stand upon its own grounds without impeaching the general rule.

24. And where a bill was filed to set aside a sale and conveyance of an advowson, and a subsequent purchaser, who was made a defendant, set up as a defence that he was a purchaser for value without notice, yet an injunction to prevent the institution of a clerk presented by the latter was granted, for the cause must proceed to a hearing, and therefore the property should be preserved till then.^(y)

(t) 2 De G. & Sm. 501; 1 Mac. & G. 150.

(u) *Finch v. Shaw*, *Colyer v. Finch*, 19 Beav. 500; 2 Eq. Rep. 1117, aff'd 5 H. L. Cas. 905.

(x) *Finch v. Shaw*, *Colyer v. Finch*, 19 Beav. 500; 2 Eq. Rep. 1117, aff'd 5 H. L.

Cas. 905; see pp. 920, 921; and see *Frazer v. Jones*, 3 Hare, 475, 12 Jur. 443, on app. *Stackhouse v. Lady Jersey*, 1 John. & Hem. 721.

(y) *Greenslade v. Dare*, 17 Beav. 502. The bill was ultimately dismissed with costs, 20 Beav. 284.

APPENDIX.

No. I. — Page 597.

IN the British Museum case, (a) where the Duke of Bedford sought to restrain the Museum trustees from building northwards to the British Museum, it appeared that in a conveyance by Lady Rachael Russell and her trustees to Ralph Montagu, of upwards of seven acres of ground upon part of which Montagu House was afterwards built, and which was next to Southampton House, belonging also to Lady Rachael, and afterwards called Bedford House, a rent of 5*l.* was reserved to Lady Rachael (who had only the equitable estate) in fee; and there was a covenant by Ralph Montagu, not with the trustees who had conveyed the legal estate to him, but with Lady Rachael, who had the equitable estate, her heirs and assigns, that he would only erect a mansion with offices on the land conveyed to him, and would not erect any building on the outermost wall of the ground northward, next to a field there, and a rent of 3*l.* a day was reserved to Lady Rachael, her heirs and assigns, in case Ralph Montagu, his heirs or assigns, should erect any buildings on the north end of the ground which should extend northward beyond the range and building of Southampton House, except a summer-house, &c. The Duke of Bedford was entitled to the rent, and Southampton (Bedford) House by purchase. The vice-chancellor said, that the policy of the law of England does not allow that the owner of land, when he thinks fit to part with it, is to impose any captious restraint upon the lawful enjoyment of the land, and those who seek to enforce a covenant which affects to restrain a particular lawful use and enjoyment of land must, according to the acknowledged principle of the law of England, show that they have some interest in that restraint, and that it is not for a captious and arbitrary purpose. The covenant was in terms made with Lady Rachael Russell, and her heirs and assigns simply. In terms, therefore, it was a mere personal covenant. The learned judge then proceeded to inquire whether the Duke of

(a) The case before L. C. 2 My. & Ke. 552; *Schreiber v. Creed*, 10 Sim. 9; *Bristow v. Wood*, 1 Col. N. C. 480.

Bedford, who was then entitled to the rent of 5*l.* a year and to the adjoining estate, would be damnified by the buildings proposed to be built, observing, that if he was entitled to an action at law for damages, he was necessarily entitled to the injunction of the court to restrain the breach of the covenant. He then observed, that it was said that the covenant was not intended to further secure the rent of 5*l.*, but for the purpose of preventing such a use of this land as should tend to diminish either the valuable or pleasurable enjoyment of the adjoining estate, and that the law will permit those restraints, so that I, who am possessed of a particular property of which I have the personal enjoyment, have a right so to deal with land which belonged to me, and is contiguous to mine, as to restrain any use which may tend either to diminish the pleasure or the profit of the land which I retain. The learned judge expressed his opinion, that if the deed did afford evidence of such an intention, there was a clear remedy at law against the act which was then sought to be enforced, and, as he before observed, a clear remedy in a court of equity by way of injunction to restrain the commission of that act. That, therefore, was the question. If a court of law declared that the deed afforded no evidence of such an agreement, equity could not collect such an *intention. A court of equity in the construction of such an agreement must follow the law. He therefore determined to send the case to law to determine what the intention really was; but he would relieve the parties from any disability or obstruction they might receive in a court of law in respect of the form of the covenant. It was said in arguing the appeal, that the vice-chancellor was of opinion that the covenant did not run with the land, which was not granted to Montagu. But he does not appear to have expressed any opinion upon the abstract point. His judgment, which no doubt is imperfectly given, is not very distinct. Two things were clear; the one, that the parties intended the covenant to secure not the rent, but the enjoyment of the open space by the owners of the adjoining estate,—this appeared on the face of the instrument; the other, a point of law, that the covenant could not run with the land, because it was entered into with a stranger to the land, that is, with the *cestui que trust*, and not with the legal owners, the trustees. But the V. C. was of opinion, that if the *intention* was established, the covenant was a legal binding one, and could be enforced at law and in equity; and he considered it indifferent in equity, as in truth it was, that the covenant did not run with the land at law, and he meant so to shape the case as to show a legal remedy if the intention were established. This seems rather to prove, that in his opinion the covenant would have run with the land if it had been entered into with the trustees of the legal fee. The case came before Lord Eldon

upon appeal, and he called to his assistance the master of the rolls, (b) and they, without determining whether the covenant could be enforced at law, but assuming that it could, held, that as the Duke of Bedford had surrounded Montagu House by buildings, the agreement no longer applied to the subjects as they existed, or if it did, it would be inequitable to enforce it, and therefore the Duke should be left to any remedy he had at law.

It was observed by the court in *Keppell v. Bailey*, that in the above case, Lord Eldon carefully guarded against being supposed to give any opinion on the question whether the covenant ran with the land; but the lord chancellor added, he had reason to believe that upon the question whether the covenant ran with the land, the opinion of at least some of the common law judges was in the negative. (c) No such opinion, however, could have been expressed from a judicial view of the case, because although a case was directed by the V. C., it was stopped by Lord Eldon, and the bill was dismissed, so that the case never reached a court of law.

In a case not reported, and of which I have not any note, but in which I was counsel, the case, writing from recollection, arose in regard to some of the houses on the east side of the Old Steyne at Brighton, the owner of which claimed to be entitled under the covenant from a former owner to have certain ground behind those houses, and which fronted south on St. James's Street, and which had become vested in assignees of the covenantor, remain unbuilt upon, and the bill was for an injunction to restrain the further erection of houses then considerably advanced from being finished. Lord Eldon refused the injunction on the ground that the plaintiffs came too late, as they were aware from the first that the houses were being erected, but no doubt was entertained of the power of the court to enforce such a covenant by injunction, and either an injunction was granted against erecting any building on the remaining frontage, or the parties acquiesced in the opinion expressed, and desisted from doing so, and the ground, when I last saw it, was still unbuilt upon, although it had been intended before the bill was filed to cover the whole of the frontage with houses.

In the late case of *Keppell v. Bailey*, (d) the opinion of the court was expressed * against such a covenant running with the land at law, and also against the liability of an assignee to the covenant in equity, although he bought with notice of the covenant, but the judgment depended upon other points.

In that case, the owners of several distinct iron works joined with other

(b) 2 My. & Ke. 552.

9 C. B. 689; *Malone v. Harris*, Dru. temp.

(c) 2 My. & Ke. 545.

Napier, 655.

(d) My. & Ke. 517; *Ackroyd v. Smith*,

persons in forming a railway, and severally engaged that they and their assigns would take all the limestone used in their works from a certain quarry (to which they were allowed to resort), and carry it, and also the ironstone from their mines to their furnaces along the railway, paying a certain tonnage; and the partnership deed of the railway recited that the strangers joined in the scheme in consideration of these benefits. The owners of one of the iron works sold them to a purchaser with notice of the covenant, and upon an application for an injunction, it was held, that he was not bound by the covenant. It was considered to be the case of mere strangers; it was a covenant by the owner of a messuage and land, with the owner of a neighboring limework and railroad, that he, and his executors and assigns, would always use that limework and railroad for making iron at, and carrying it from such messuage. It was further considered, that although there was no mischief in men binding themselves and their representatives, that is, their assets, real and personal, to answer in damages for such obligations, yet great mischief would arise if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands a peculiar character which should follow them into all hands however remote. If one man may bind his messuage to take lime from a particular kiln, another may bind his to take coals from a particular pit, besides many other restraints infinite in variety. Even in cases of leases, collateral covenants do not run with the land; will the law, it was asked, recognize the devoting a house to this or that trade, and impressing upon it, into whose hands soever it may come, the obligation to carry on the trade for the benefit of the other property of the party covenantee to whom the house originally belonged? The law cannot do so without sanctioning the creation of a new species of tenure by means of such covenants; and after examining the cases particularly upon leases, the court concluded, that even in the case of a lease the authorities were adverse to such a covenant being real and inherent even in that case of privity, but that where no such privity could be pretended to exist as in the present instance, the covenant was plainly collateral, and bound not the assignee.

It was not necessary, in order to arrive at this conclusion, to decide upon the validity of such covenants with reference to their object: they might be perfectly valid, and yet not bind the estate in the hands of the assignee. The general doctrine laid down in this case cannot be relied upon; it is altogether new; and if it were to be acted upon, such an agreement as that in *Keppell v. Bailey* could not be enforced in equity even between the parties, because it ought, according to the opinion expressed, to bind only to the extent of damages; and if the purpose was unlawful, or had

a tendency opposed to public policy, of course it could not be enforced in equity, even between the parties themselves; and yet (if there had been no other objection) it would have been an ordinary equity to have granted an injunction at the suit of either party in *Keppell v. Bailey* to enforce the covenant. The learned judge thought the objection that it tended to a perpetuity did not exist upon general grounds, but his subsequent opinion rendered it unnecessary to consider that point, for if the covenant did not in any manner affect the land, the question did not arise. It is better not to lay down any universal principle upon this point. Equity, as Lord Nottingham said upon another occasion, will know when to stop where the mischief is apparent. It is abundantly proved that equity will not interfere where there would be no damage to the plaintiff, or where the change of circumstances would render it inequitable to do so. There is no danger of inconvenience arising from the tenures of property by the cautious administration in these cases of equitable relief.

* But the court, in holding that the obligation was not merely collateral, but that it was illegal as regarded the land, had in view the next point to which its attention was directed; viz. Whether the purchaser, with notice was bound by the covenant in equity? The court observed, that the knowledge by an assignee of an estate that his assignor had assumed to bind others than the law authorizes him to affect by his contracts,—had attempted to create a real burden upon property which is inconsistent with the nature of that property, and unknown to the principles of the law, cannot bind such assignee by affecting his conscience. If it did, then the illegality would be of no consequence, and the court would be occupied in compelling persons, by way of injunction and decree, to perform covenants which the law repudiated, and for the breach of which no damages could ever be recovered. A case like this, it was said, bears no analogy to the ordinary case of a purchase with notice of a prior agreement by the vendor to sell the premises to another. Such a purchaser has done an unconscientious act, or at least made himself accessory to the unconscientious act of his vendor in selling another man's property, and therefore his bargain cannot protect him against the prior claim, but that of which he there had notice was the legal and valid act of the vendor; whereas that of which the assignees in this case had notice was their assignor's covenant affecting to bind the land on which by law it could not operate. Observe, it was said, how this would apply to all assignments of leaseholds. Every assignee of a lease has notice of the lessee's covenants, consequently no covenant, how absurd soever, could be made by a lessee that would not of necessity run with the land in equity, into whose hands soever the land might come; and all the decisions that have

been made by the courts with respect to such covenants being collateral or in gross, would be of no avail, because, though no damages could be recovered for breach of them, yet the performance of them could be enforced against every assignee of the term as a party necessarily fixed with notice. So a person who had conveyed land, and subjected it to covenants in the hands of his vendee, could at once make sure of his burdens, following it into the hands of all holders to whom it might pass, by taking the precaution of notifying the covenant in some effectual though easy manner, as by publication in some place near the premises, where the purchaser must needs observe the announcement.(1) The court of chancery, it was added, will never interfere by way of injunction, or in any other manner, to enforce such covenants, when satisfied that they could receive no support or countenance at law.

Now the distinction is not distinctly kept in view, that the court itself did not deny the legality of the covenant in the above case, as binding upon the covenantor and his representatives,—and of course it requires no argument to prove that,—but did deny the legality of the attempt to make it run with the land. The covenant being collateral, the law did not bind the assignee by it in that character; but if equity give relief upon such a covenant, the court is not “occupied in compelling persons, by way of injunction and decree, to perform covenants which the law repudiates, and for breach of which no damages could ever be recovered,” because the covenant is a legal one, and damages for the breach of it could be recovered, and therefore all that the court of equity does is to support a legal contract, which respects the land, against the alienee of the land, in a case in which the covenant does not bind him at law. Can this be done? It is said that the case bears no analogy to the ordinary case of a purchaser with notice of a prior agreement by the vendor to sell the estate to another; the distinctions relied upon are, that the purchaser in that case is acting against conscience, that he had notice of a legal and valid act of the vendor; whereas, in our case, the notice is of an illegal attempt to bind the land. *It is remarkable that the strict analogy between the cases should not have presented itself to the mind of the learned judge. A covenant by a man for himself, his heirs and assigns, to sell his estate to another, even if he have received all the purchase money, does not bind the estate or the assignee of it at law; in other words, the covenant does not run with the land, but is a mere personal covenant, for a breach of which damages only can be recovered. But in equity, where that which is agreed to be done is considered as performed,

(1) It would not be prudent to rely upon such an announcement as notice.

the covenant, or a mere agreement not under seal, and whether it imports to bind the assignees or not, will bind them, unless they have a better equity; viz. have purchased the estate *bonâ fide*, and without notice. Upon precisely the same principle, a valid legal covenant, like that in *Keppell v. Bailey*, although not running with the land, may in equity bind those who acquire the land as assignees, if without consideration or with notice. It is a contract to which equity may give effect by injunction, for there are many cases in which that court may enjoin the breach of a covenant by injunction, although, from the nature of it, they could not enforce it by a specific performance. The difficulty which is started as to collateral covenants in leases binding assignees, has never occurred in practice, because, from the nature of them, they sound in damages, which equity does not profess to give, and from the object of them they do not admit of specific performance. It is a mistake to suppose that such covenants cannot bind an assignee in any case, or that they must all bind him in every case; if they run with the land at law, the assignee is bound under all circumstances, but it does not follow that equity will enforce them: if they do not run with the land at law, yet they *may* be held to bind the assignee in equity. The vice chancellor, in the *British Museum* case, did not doubt that the covenant there, although it did not run with the land, would be enforced in equity against the alienee; all that he doubted was the intention, upon the construction of the covenant, to restrain the erecting of buildings northwards, with a view to the enjoyment of *Southampton House*; and Lord Eldon went upon the change of circumstances, and not upon the want of jurisdiction, which he appears never to have doubted in any of these cases; and yet the opinion of the court in *Keppell v. Bailey* would strike at all these cases, on the ground that the covenant was an illegal attempt to enforce restrictions on an alienee of land, which the law does not allow. *Collins v. Plumb* and the *British Museum* case prove that equity will not interfere where there would be no damage to the covenantee, where the change of circumstances would render it inequitable, or where the remedy lies peculiarly at law from the nature of the act to be done or to be refrained from, and the damages to result by the breach.

My anxiety is only to examine the important legal principles laid down in the above case. Upon the case itself, therefore, I shall merely suggest to the learned reader, that the agreement (independently of questions upon the railway and canal act), was a legal one, and the effect of it was to bring the business of the furnaces partially into the stock of the sub-railway company, "whilst the then owners, their executors, administrators, or assigns, should be proprietors or lessees, or occupiers of the furnaces."

To this there could be no objection, and as the purchaser bought with notice, and could have performed the obligation, he was bound to do so, and to abstain from making a new railway in order to avoid the necessity of using the old way. And beyond the general principles of a court of equity, there was this further ground, that the purchaser left his vendor exposed to an action for a breach of the covenant, of which he had notice, and which he alone was enabled to perform.^(e) There were other points in the case to which I do not advert, which, in the opinion of the court, rendered it unnecessary to decide the points which we have been considering, and a question might perhaps * have been raised upon the necessity of the unity of title to the railway shares and the furnaces.

In a late case before Shadwell V. C.,^(f) which has been reported since the above observations were published, the owner of a large piece of ground which was laid out in lots for building a row of houses, having sold some of the lots, he and the purchasers executed a deed whereby he declared that it should be a condition of the sale of all the lots that the several proprietors should observe the stipulations in the deed. And then the parties mutually covenanted that they and all others who should at any time execute the deed should observe certain rules in regard to the houses to be erected, and by one they were restrained from carrying on certain trades in them. This restriction was held to be binding in equity on a purchaser with notice, although he had not executed the deed, but claimed derivatively through a purchaser who had, and it was deemed no objection that the plaintiff who sought an injunction had not himself executed the deed, as he claimed direct through a purchaser who was considered to have done so. The defendant insisted that the restrictions were not in law binding upon him, for that such covenants were not only void, as being in restraint of trade, and without mutuality, and against the policy of the law, but were collateral and did not run with the land, and that there was no privity. The vice chancellor observed that it was quite clear that all the parties who executed the first deed were bound by it, and he saw no reason why such an agreement should not be binding in equity on the parties coming in as devisees or assignees with notice; each proprietor was manifestly interested in preserving the general respectability and uniformity of the row. Whatever might be the form of the covenant, or whatever difficulty there might be in bringing an action on it, he thought there was a plain agreement which a court of equity ought to enforce, and although no case might arise at law upon the covenant,

(e) See 5 Mod. 374; *City of London v. see Hatton v. Waddy*, 1 H. & J. 601; *Richmond, Pre. C.* 156; 2 Ver. 241. *Mann v. Stephens*, 15 Sim. 377.

(f) *Whatman v. Gibson*, 9 Sim. 196;

there might be a question on the deed which would demand the opinion of a court of equity, and therefore he granted an injunction to prevent the defendant from converting his house into a tavern contrary to the deed. This decision we may observe is fully warranted by the cases previous to that of *Keppell v. Bailey*.

And in a later case (*g*) before Lord Cottenham C., where an owner in fee of Leicester Square, and of several of the houses in the square, sold the pleasure-ground, and the purchaser covenanted to maintain it as such, uncovered with any buildings, &c., and a person who claimed the ground under divers conveyances, and in the conveyance to whom there was no similar covenant with the seller, but he admitted notice of the deed, was about to alter the character of the ground, and asserted a right to build thereon, — the court, without calling upon the counsel who maintained the continuing operation of the covenant, held that it was a fit case for an injunction. That the court had jurisdiction to enforce a contract between the owner of land and his neighbor purchasing a part of it; that the latter should either use or abstain from using the land purchased in a particular manner was what he (the chancellor) never knew disputed. It was said that the covenant being one which did not run with the land, the court could not enforce it; but the question was not whether the covenant ran with the land, but whether a party should be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. If there was a mere agreement and no covenant, the court would enforce it against a party purchasing with notice of it. With respect to the observations of Lord Brougham in *Keppell v. Bailey*, he never could have meant to lay down that the court would not enforce an equity attached to land by the owner, unless under such circumstances as would maintain an action at law. If that were the result of his observations, * he (the chancellor) could only say that he could not coincide with it. (*h*) The purchaser of the inclosure in Leicester Square, in a contest between him and the vendor to him, contended that he was not bound to enter into any covenant to indemnify the vendor against his covenant when he purchased to keep the area unbuilt upon; but as he was plaintiff it was decided otherwise. (*i*)

(*g*) *Tulk v. Moxhay*, 2 Phil. 774; 11 Beav. 571; *Hodson v. Coppard*, 29 Beav. 4.

(*h*) See also 11 Beav. 582.

(*i*) *Moxhay v. Inderwick*, 1 De G. & Sm. 708.

No. II. — Page 631.

THIS was decided in *Ex parte* Manning, cited in the text, where the reversion sold was expectant upon a life; the report was confirmed absolute, but the conveyance was not executed until two years afterwards, two months before which the purchaser was ordered to bring his purchase money into the bank, and about that time the life fell in, and upon that ground application was made for interest from the day when the report was confirmed absolute; and it was ordered accordingly. The master of the rolls said, that from that time the purchaser was sure of his title, and of his purchase, though the tenant for life had died the next day; and from that time the life was wearing, which is equivalent to the taking of the profits; and in case the purchaser had taken the profits, he must certainly have paid interest; also from the time of the report confirmed absolutely, the estate is bound, and the party who was to convey is become but a trustee for the purchaser, who ought to have the money ready. The decision, therefore, was put upon the true ground, viz. the wearing of the life, which is equivalent to the taking of the profits, although the application was grounded upon the life having actually dropped.

In *Davy v. Barber*,^(k) a purchaser under the court of an estate in fee, let partly upon lives, was kept out of possession long after the confirmation of his purchase by an incumbrancer, who was also the husband of the heir at law of the persons for the payment of whose debts the estate was sold, and during this delay several lifehold estates dropped in, and the estate, it was alleged, was increased 2,000*l.* in value. The purchaser sought to have the possession; and the creditors *to have the bidding opened*. The purchaser agreed with the heir at law, in court, to pay an additional 1,300*l.* Lord Hardwicke observed, that in the west of England, estates were constantly let out upon lives, and small conventionary rents reserved, but the chief profits arose from the dropping in of lives, which was not considered as accidental, but as part of the annual profits of the estate. The purchaser, he observed, had been obstructed in taking possession, and the estate was worth a great deal more by the dropping in of lives. The question then was, who was to have this advantage, or what recompense was to be made for it. After referring to purchases by private contract, he said that the present was a case of a different nature, being a bidding under a decree of the court, and upon which the court must finally make a determination. The purchaser had plainly a considerable advantage by the dropping in of lives, and had it not been for the agreement to pay the 1,300*l.* he should have inclined to direct an inquiry what *interest* was

(k) 2 Atk. 849.

proper to be paid by the purchaser; for if the court were not to give such direction, there would be a manifest injustice. But as the purchaser had agreed to pay 1,300*l.* more, he did think he was entitled to the advantage arising from the dropping in of the lives. In this case the purchaser was not in default; he was desirous of taking possession, but was kept out by an incumbrancer; yet, as there was a benefit gained to the estate, and it was not alleged that the purchaser had not the benefit of the purchase money, it was considered that he ought to pay *interest*, but the liability was not carried beyond interest.

*The case of *Blount v. Blount*, before Lord Hardwicke, at a later period, is not accurately reported. (1) The facts, as they are collected from the statement and the judgment, were, that a man created a 1,000 years' term for particular purposes, and the trustees did not take possession on the grantor's death. The son, as heir at law, therefore took possession, and the estate having been put up to sale by the court, in a suit instituted by him for payment of the father's debts, he bought the estate, and his purchase was confirmed absolutely; and four years afterwards an application was made that he should pay interest from the time the report was so confirmed. At the time he took possession, a small part of the estate consisted in rackrents, but the greatest part was standing out in reversions upon lives; two of these reversionary estates had fallen in since the purchase, and the purchaser had accounted for profits before the master for a year after being confirmed the purchaser. Lord Hardwicke was of opinion that the purchaser was not to pay interest. He observed, that it was said the purchase was of a reversionary estate, but it was not so; the purchaser bought a 1,000 years' term, and was himself owner of the reversion; he was not in possession under the purchase, but as heir at law of his father, on the trustees of the term refusing to take possession: no possession was delivered to the purchaser by virtue of his purchase, and *he was subject to an account*, and therefore no pretence for making him pay interest. But he directed the master to inquire what increase of value had arisen by the falling in of lives since the purchase of the estate, and what had been received for heriots by the purchaser, or for fines in letting out estates again; and he declared they ought to be considered as part of the profits of the trust estate of the 1,000 years, and the purchaser was ordered to account for the same in a subsequent account, and to proceed in the purchase. This case, therefore, altogether depended upon the possession having been referred to the 1,000 years' term, under which, indeed, the purchaser had acted, for he had already accounted for the profits down to a period a year beyond that when his purchase was confirmed absolute; and

(1) 3 Atk. 636.

he neither paid interest nor received any benefit from the wearing or dropping of lives before he completed his purchase. Lord Hardwicke, however, in this case made some general observations. He said the estates consisted chiefly of lifeholds, and therefore it was insisted, as they were perpetually falling in, the purchaser ought not to run away with the benefit of this, and yet not pay interest for the purchase money. And to be sure, Lord Hardwicke added, in general this may be right. Where *estates have dropped in* between a person's being reported the best purchaser by the master, and his taking possession, the court have either directed a purchaser to make some compensation in consideration of the estates being bettered, or otherwise to go before a master again, and the estate to be put up for a new bidding. — As to what had been said of the advantage a purchaser receives from *wearing out* of lives, he never knew the court to take this into consideration as a reason for a purchaser's paying interest. But these dicta, if they are rightly reported, do not accord with the law of the court, which is settled as before stated — the purchaser from the time the report is confirmed is entitled to any benefit from the dropping of lives, and is liable to pay interest from that period.

This was decided by Lord Thurlow in *Child v. Lord Abingdon*,^(m) where the property purchased from the court was a reversion upon an estate for lives, on which there was one life remaining at a very trifling rent: the purchaser was reported the best bidder before Christmas, 1788, and in February, 1790, he having taken no steps to complete the purchase, an application was made that he might pay interest from the time of the report, and Lord Thurlow said he must pay interest. A man cannot purchase a dry reversion, and then lie by for years, and expect to pay no more for it then than if he had completed it immediately.

In a late case in the House of Lords, where the contract stipulated for a good title on the first of May, 1813, and that the purchaser should be entitled to the rents * from that period, or from such time as the purchase should be completed, and the purchaser having paid part, agreed to pay the remainder of the purchase money on the 1st of May, 1813; and as there were many leases for lives, some of which had already dropped, the purchaser agreed to pay the value on such lives, and provision was made for payment to the purchaser, and others entitled to the money of interest on the deposit, from the day it was paid to the time of the completion of the purchase. Upon a bill filed by the sellers, it was decreed, after the usual references as to the title, that the master should inquire whether any of the persons for whose lives any part of the estate was held on the 29th of September, 1811, had died since that time, and should also in-

(m) 1 Ves. jr. 94.

quire how much the value of the estate had been increased by the deaths of such persons. After a long litigation it was established that the title was a good one, and that the sellers were able to make such a title before the commencement of the suit, but that a good title was not shown until several years afterwards.(1) After the decree, an order was made (which was reversed for irregularity) for the master to inquire generally how much the value of the estate had been increased by the wearing of the lives or increase of the ages of the persons for whose lives any part of the estates was held. And this was considered in the House of Lords to be correct, without reference to the conduct of the purchaser, and upon the ground that the purchaser could not have the benefit of an increase in the value of the estate without paying interest: it was admitted that if the amount of interest exceeded the increased value, he would only have to pay so much as was equivalent to the increased value.(n) It was not, however, possible to decide these points, as the order itself was reversed for irregularity; and upon an appeal to the House of Lords against the original decree, by the sellers, upon the ground that it ought to have directed an inquiry as to how much the value of the estate had been increased by the *wearing* of the lives, or otherwise, that the directions as to the dropping of the lives should be omitted, the original decree was affirmed. It was considered that the parties had stipulated that the rents should be the property of the purchaser only from the time the purchase was completed. It followed, from the reservation of the rents to the vendor, that the purchaser was not to be called upon to pay interest on the purchase money. The case was decided upon the ground that the contract excluded the claim by the seller, of interest, and of the benefit of the increased value by the wearing of the lives.(o) The decree of affirmance in the Lords of the original decree, of course overruled the view expressed by the law Lords in the appeal from the interlocutory order.(p) The court below afterwards, upon further directions, observed that as the property would, by the conveyance, in truth be placed in the purchaser's possession *ab antecedenti* by the intermediate wearing of the lives, it was necessary, in order to do equity between the parties, that the conveyance should be dated from the earliest period when a good title was shown by the sellers, and that they should be entitled to the principal money, with interest, and the purchaser to the rents and profits from that earliest date: therefore, the period when the master found a good title had been shown was taken

(n) *Champernowne v. Brooke*, 3 Cl. & Fin. 4. (o) 4 Cl. & Fin. 589; 3 Y. & C. 510, 511.

(p) *Sugd. H. of L.* 666.

(1) This is not accurately stated in 3 Cl. & Fin. 11.

for the commencement of the several rights to interest, and the rents and profits. But the seller was also decreed to be entitled to the increased value arising from the *dropping* of lives, between the period up to which the parties had agreed to a fixed compensation,(1) and the period when the interest was to commence. The principle on which this increased value was to be calculated, was not settled.(g) It seems clear that the allowance ought not to exceed the amount of interest on the purchase money, for if it should, the vendor would derive a greater benefit from his laches than he would have been entitled to if his title had been ready at the day named.(2) The opinion delivered in the House of Lords in the above case, was considered to be in opposition to that expressed by Lord Hardwicke in *Blount v. Blount*, but it was thought that matters of this sort were now better understood. The equity was considered clear, that the purchaser should not be allowed a profit on the purchase money, and the advantage of receiving the rent both at the same time (from whatever cause he may have been kept out of possession of the estate), but that the seller should either have interest on the purchase-money or the profits of the land. This, as we have seen, was finally overruled by the House of Lords as applicable to the case before it, the contract having excluded the claim ; but, as a general rule, uncontrolled by the provisions of the particular contract, it is fully warranted by the authorities.

No. III. — Page 514.

Schedule to the Declaration of Title Act, 1862.

1. EVERY petition for a declaration of title, shall contain an exact description in their actual state of the lands, as to which the declaration is sought, stating particularly the boundaries thereof, and the lands on which the same and every part thereof abut, and, so far as conveniently may be, the names and descriptions of the owners and occupiers of such last-mentioned lands.

2. On the investigation of the title to the lands as to which the declaration is sought, the identity of the lands described in the petition, with the parcels as described in the title deeds, shall be established by affidavit or otherwise, as the court may deem just.

(g) *Townsend v. Champernowne*, 3 Y. & C. 505.

(1) This was the period when the purchaser received a draft conveyance stating the agreement.

(2) The matter was, I am told, at last compromised.

3. The court may, if it shall deem it necessary or proper, require the petitioner to lodge in court a map or plan of the lands in question.

4. The petitioner, after obtaining the order for a declaration of title, shall cause a copy thereof, together with the description of the lands in question, with any engraved or lithographed plan thereof (if any exists) to be served on every adjoining occupier and owner, or on such of them and on such other persons (if any) as the court may direct to be so served.

5. He shall also cause a copy or copies thereof to be deposited in some office or place, offices or places, to be appointed by the court on or near to the lands in question, to be accessible at all reasonable times to all persons desirous of examining the same, and notice of every such deposit shall be affixed in some public place or places on or near to the lands in question.

6. Every such copy served on any adjoining occupier or owner, or deposited as aforesaid, shall state that any person wishing to show cause against the making of the proposed declaration may do so by presenting a petition in a summary way to the court of chancery at any time before the day appointed for making the proposed declaration.

7. The petitioner, after such deposit shall have been made, shall cause advertisements to be inserted three times at least in such newspapers on such days as the court shall direct, stating the said order, and stating also where any copy has been so deposited for inspection.

8. Unless the last of such advertisements is made within four weeks next after the date of the order, the time thereby fixed for showing cause against the same shall be enlarged for one calendar month, or such further time as the court shall direct.

* No. IV.—Page 514.

A bill intituled "An Act for further Limitation of Actions and Suits relating to Real Property in support of the Title of Purchasers."

WHEREAS it is expedient to simplify the title to real estate, in order to facilitate the transfer thereof upon sales: Be it therefore enacted by the Queen's most excellent majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, as follows:

1. After the 1st day of June, 1863, no entry, distress, or action shall be made or brought against any *bonâ fide* purchaser for money considera-

tion, or any person claiming through him, to recover any land or rent, but within twenty years next after the actual conveyance of the land or rent to the purchaser, and the payment by him of the purchase money: provided that where any such purchaser, at or before the execution of the conveyance to him, or the payment of the purchase money, had actual notice or had reason to believe that the estate or interest of the claimant existed or might become available, this act shall not afford such a purchaser or any person claiming through him any bar to the claim, but his defence shall remain as it would have stood if this act had not passed.

2. In the construction of this act the right to make an entry or distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued at the time of the execution of the conveyance to a *bonâ fide* purchaser, and payment by him of his purchase money (whichever of those acts shall last take place).

3. Provided also, that if at the time when the right under this act of any person to make an entry or distress or bring an action to recover any land or rent shall have first accrued such person shall have been under any of the disabilities hereinafter mentioned (that is to say), infancy, coverture, idiocy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress or bring an action to recover such land or rent at any time within five years next after the time at which the person to whom such right shall have first accrued as aforesaid shall have ceased to be under any such disability, or shall have died, which shall have first happened.

4. Provided, nevertheless, that no entry, distress, or action shall be made or brought by any person who at the time at which his right to make any entry or distress, or to bring an action to recover any land or rent, shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within thirty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such thirty years, or although the term of five years from the time at which he shall have ceased to be under any such disability or have died shall not have expired.

5. Provided, also, that when any person shall be under any of the disabilities hereinbefore mentioned at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, and shall depart this life without having ceased to be

under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent, beyond the said period of twenty years next after the right of such person to make an entry or distress or to bring an action to recover such land or rent shall have first accrued, or the said period of five years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person.

* 6. Where the estate or interest claimed, or to which any person may become entitled, is an estate or interest, in reversion or remainder, or other future estate or interest, and the purchaser claiming under the conveyance to him shall claim to hold discharged therefrom, the person claiming such estate or interest, or any person having competent authority on behalf of any infant or of any person under any other of the disabilities hereinbefore mentioned, or of any unborn issue, may at any time during the said term of twenty years maintain a suit in equity for establishing and securing such future estate or interest against the purchaser and all persons claiming through him; and if the right shall be established to the satisfaction of the court, the estate or interest decreed or ordered by the court shall take effect as and when it shall fall into possession, but without prejudice to the right of the purchaser, and all persons claiming through him, to such estate or interest as the seller to him was entitled to convey to him.

7. Provided, always, that if any tenant for life or for any other limited interest which shall not enable him to convey to a purchaser the fee simple or the whole extent of interest which he sells, shall sell and convey to a *bonâ fide* purchaser for a money consideration the fee simple or some lesser interest to which he is not really entitled, and shall conceal from such purchaser the deed or instrument under or by which the estate sold is settled upon others, whether *in esse* or unborn, the purchase money received by such seller, or by any other person by his direction, shall be and be deemed trust money, and shall be treated by a court of equity as nearly as may be as if the estate had been authorized to be sold under any such deed or instrument as aforesaid, and the purchase money had been directed to be invested in another estate to be settled to the same uses, but so nevertheless that no such seller so fraudulently concealing any such deed or settlement shall take any interest in such purchase money, or in the estate to be purchased therewith, prior to or before the uses, trusts, or limitations to take effect after the determination of the life estate or the other particular interest limited to him, and the court shall give directions to exclude him therefrom, and if necessary, to accumulate the dividends or interest of the purchase money until some person shall

become entitled under the suppressed or concealed deed or instrument to an estate or interest expectant upon the estate or interest provided for or limited to the seller, and which estate or interest of any such person will by force of this provision become an estate or interest in possession in consequence of the exclusion of the seller from any present interest therein: provided, always, that nothing herein contained shall exclude the seller from any right or interest to which he may be entitled in default of or after the determination of the previous estates or rights provided for other persons *in esse* or issue unborn; provided, also, that where the purchase money shall be secured as aforesaid in favor of any person or persons entitled under any such suppressed or concealed deed or instrument, any such person or persons shall be and remain barred of any remedy to which he or they might otherwise be entitled against the purchaser of the property sold, or any person claiming under him; and if any such person shall have recovered in any such action or suit the estate sold before the purchase money shall be secured as aforesaid, it shall be lawful for the court to indemnify the purchaser, or those claiming under him, from the loss sustained by him or them, out of the interest in the purchase money secured for the benefit of the person who shall have recovered or become entitled to the original estate itself by force of any such action or suit as aforesaid: provided, always, that any person *in esse* entitled to have the purchase money secured as aforesaid may by himself, or other competent authority, or any fit person may on behalf of issue unborn, file a bill in equity to have the money secured, and the rights declared, according to the provisions hereinafter * contained, and the costs of all such proceedings shall be in the discretion of the court: provided, also, that nothing herein contained shall take away the right of any purchaser, or of any person claiming under him, to such relief as he otherwise would have been entitled against any seller, or those claiming under him, in consequence of any such deed or settlement as hereinbefore is referred to having been concealed or suppressed upon the sale to him.

8. Nothing in this act contained shall in any case enlarge the time allowed for the making or bringing of an entry, distress, or action by the act of the session holden in the third and fourth years of the reign of King William the Fourth, chapter 27, intituled "An act for the limitation of actions and suits relating to real property, and for simplifying the remedies for trying the rights thereto."

9. And be it further enacted, That when the right of any person to make an entry or distress or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession shall have been barred by the determination of the period hereinbefore

limited, which shall be applicable in such case, and such person shall at any time during the said period have been entitled to any other estate, interest, right, or possibility, in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress, or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right, or possibility, unless in the mean time such land or rent shall have been recovered by some person entitled to an estate, interest, or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession.

10. And be it further enacted, That when the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right which such tenant in tail might lawfully have barred.

11. And be it further enacted, That when a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period hereinbefore limited, which shall be applicable in such case, for making an entry or distress or bringing an action to recover such land or rent, no person claiming any estate, interest, or right which such tenant in tail might lawfully have barred shall make an entry or distress, or bring an action to recover such land or rent but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action.

12. No person claiming any land or rent in equity shall, after the said 1st day of June, 1863, bring any suit to recover the same against any *bonâ fide* purchaser for valuable consideration, or any person claiming through him, but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or distress or brought an action to recover the same respectively if he had been entitled at law to such estate, interest, or right in or to the same as he shall claim therein in equity.

13. At the determination of the period limited by this act to any person for making an entry or distress or bringing an action or suit, the right and title of such person to the land or rent for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period shall be extinguished.

14. The preceding provisions of this act shall not extend to the making or *bringing of any entry, distress, action, or suit by a spiritual or

eleemosynary corporation sole, nor to any action or suit to enforce a right to present to or bestow an ecclesiastical benefice as the patron thereof.

15. In the preceding sections of this act the words "land," "rent," and "person" respectively shall be interpreted according to the interpretations provided for the same words respectively in the said act of King William the Fourth; and the person through whom another person is said to claim shall mean such person as is in that behalf described in section 1 of the said act; and the expression "beyond seas" shall have the same meaning as is given to it in section 19 of the said act.

16. No seller of land who shall have been in possession under a purchase made by him, or some person through whom he derives title for twenty years or upwards before his contract for sale, shall be bound to produce a title with a root extending beyond forty years, unless required to do so by the contract for sale, or unless the court shall be of opinion that there is reason to suppose that some settlement or will prior to that period may have been executed which might prejudicially affect the purchaser's title; but this provision shall not extend to relieve a vendor of a leasehold interest from furnishing an abstract of the instrument of demise in any case where he would have been bound to do so if this enactment had not been made.

No. V.

Bratt v. Ellis, C. B., Mich. and Hil. Terms, 45 Geo. III.

JOHN GOODWIN being indebted to Ellis, the defendant, an auctioneer, deposited the title deeds of some houses with him, as a security; and gave him a written authority to sell them by auction, at any time before midsummer, 1803. They were accordingly put up at Garraway's; and not fetching the sum expected, they were bought in by Goodwin. Ellis not being paid, put up the houses again in September, 1804, under the usual conditions. The plaintiff was declared the highest bidder at 315*l.*; paid a deposit of 75*l.* and signed an agreement to complete the contract. The defendant delivered possession to the plaintiff, who expended about 10*l.* in repairs; and the defendant sent the deeds to the plaintiff's attorney, who approved of the title, and prepared a conveyance; and the defendant undertook to procure Goodwin to attend and execute the deed. Goodwin, however, upon being applied to, refused to complete the contract, which was made without his authority. The plaintiff brought the present action to recover the deposit money and interest, and the expense of perusing

the abstract, preparing the conveyance, &c.; and the damages the plaintiff had sustained by losing such a good bargain. The plaintiff gave 315*l.* for the houses, and a surveyor, examined on his behalf, proved that they were worth 751*l.* The defendant suffered judgment to go by default. Upon the execution of the writ of inquiry of damages, the defendant's counsel admitted that he was liable to repay the deposit, with interest, and fair expenses incurred in investigating the title, &c. But as it appeared by the declaration that the defendant was only an auctioneer, and Goodwin was the owner, he insisted that the defendant was not answerable for the difference of value. The sheriff, in his charge to the jury (which was specially summoned) said, it was admitted on all hands, that the deposit and interest, and expenses, must be paid to the plaintiff. With respect to the demand for the loss of the bargain, he thought that the demand was recoverable; for the defendant had admitted that he had sold the property without authority; but the amount of the damages was in their discretion. * They would consider whether it would have sold for 751*l.* If they believe the surveyor, it would be quite competent to give the whole, or what they pleased. The jury returned a verdict for 350*l.*, being upwards of 250*l.* as damages for loss of the bargain. The court of common pleas, however, granted a rule to show cause why the writ of inquiry should not be set aside, and the defendant let in to plead in the action, upon paying into court the deposit money, and interest, and on payment by the defendant to the plaintiff of his costs occasioned thereby, together with his costs of the present application. Upon showing cause, the court made the rule absolute; on payment to the plaintiff of the deposit, with interest, the costs of investigating the title, and the costs of the action, *as between attorney and client.*

No. VI.

Jones v. Dyke and others, Hereford Summer Assizes, cor. Macdonald, C. B.

THE circumstances of the case were shortly these. Some estates in Wales having been advertised for sale, the plaintiff came to town, and after some treaty with the defendants, who were the auctioneers employed, he agreed to purchase the estate in question, at 975*l.*; and it was agreed that he was to pay the deposit in nine days, and to give his note for it at that date, which he accordingly did. Tuchin, one of the defendants, by the desire of his partner Dyke, gave the plaintiff a receipt for the deposit, and signed a printed particular, which together amounted to an agreement in writing.

In a few hours after this transaction, Dyke and Tuchin, called on a friend of the plaintiff's to acquaint him that they had just received a letter from Wales, stating that the estates were sold for more money, and requesting the particular and receipt to be returned; and the plaintiff refusing to relinquish the agreement, and having immediately returned to Wales, they by the next post sent to him his note of hand, and a particular signed by him, both of which he instantly returned.

The 100*l.* was tendered in payment of the note, and refused: the residue of the purchase money was prepared in time, and deposited at a banker's.

The plaintiff filed a bill in equity against the owner of the estate, and his trustees for sale, who denied the authority of the defendants to sell, in consequence of which the plaintiff was advised to dismiss his bill.

The plaintiff then brought an action against the defendants, in which he proved by two witnesses that the estate purchased was worth 2,117*l.* 10*s.*, so that he lost upwards of 1,140*l.* by breach of the agreement.

It appearing that the defendants had no authority to sell, the plaintiff had a verdict by consent for 261*l.*, the judge thinking the items of which that sum was composed reasonable, but the plaintiff did not obtain any damages for the loss of his bargain.

The sum of 261 <i>l.</i> was thus made up:					£	s.	d.
Costs of the plaintiff's solicitor	-	-	-	-	47	19	4
Costs of the trustees in equity, about	-	-	-	-	30	-	-
Interest of 975 <i>l.</i> from April 1804 to April 1807	-	-	-	-	146	5	-
Journeys to London and Llandilo, about 20 days, horse-	}						
hire and travelling expenses					21	-	-
Journey to London	-	-	-	-	15	15	-
					<hr/>		
					£260 19 4		

* No. VII.

Wyatt v. Allan, Reg. lib. B. 1777, fol. 576.

THE bill was filed by Wyatt, charging that he, as agent for the defendant Allan, purchased an estate by auction, but that the defendant having denied the commission, he himself was forced to complete the purchase. The purchase money was 435*l.* The defendant by his answer denied that he employed the plaintiff to purchase the estate.

The chancellor directed an issue to try the fact, and that if the jury found that an authority was given by Allan, they should indorse on the *postea* to what amount such authority extended. The jury found that

Allan did give an authority to the extent of 400*l*. Upon the cause coming back on the equity reserved, the defendant was ordered to pay the plaintiff the 400*l*., and the plaintiff was to assign the estate, and the defendant was to pay the costs both at law and in equity.

No. VIII.

Sir John Morshead and others v. Frederick and others,
Ch. 20th February, 1806.

CERTAIN estates of the late Sir John Frederick were devised to trustees upon trust, by mortgage or sale thereof, to raise 34,000*l*. for the benefit of his two daughters, Lady Morshead and Miss Thistlethwayte. Part of his estate consisted of a house in the occupation of Smith, Payne and Smith, the bankers. In 1751, a ground lease of this house was granted for sixty-one years, at 56*l*. a year. The representative of the lessee assigned the lease to Smith and Company, subject not only to the original ground rent of 56*l*. a year, but also to an additional rent of 210*l*. A bill was filed for carrying the trusts of Sir John Frederick's will into execution. With the approbation of all parties, the house in question was offered for sale, and represented as subject to the ground lease at 56*l*. a year. Smith and Company employed an auctioneer to enter into a treaty with the plaintiff's solicitors for the purchase of the house, and he was informed by them that it was subject to the lease at 56*l*. a year. The auctioneer valued the house as being subject to the lease, and to no other rent, charge, or incumbrance, at 6,150*l*., and verbally agreed with the plaintiff's solicitors for the purchase by Smith and Company of the house at that sum: the contract was referred to the master, who approved of it, and by an order in the cause, Smith and Company were directed to pay the purchase money into court, to the credit of the cause, and it was ordered that they should be let into receipt of the rents from the last quarter day. The title was approved of on behalf of the purchasers, and the money was paid into the bank according to the order. A few months afterwards, and before the conveyance was executed, application was made to Smith and Company for payment of the rent of 210*l*., to the person entitled to it. Upon this, Smith and Company insisted upon an abatement in the purchase money, which the plaintiffs would not accede to. A motion was then made to the court by Smith and Company, that the money paid into the bank might be repaid to them, and the contract for the purchase of the house rescinded. In support of this motion, the auc-

tioneer swore, that he valued the house as subject to the 56*l.* a year only, and that he was ignorant of its being subject to any other rent or outgoing. The solicitor for Smith and Company swore, that no notice was taken in the abstract of the lease, by which the 210*l.* a year was *reserved. One of the bankers swore, that when the money was paid into the bank, and when the valuation was made, he and his partners believed that the auctioneer had been made fully acquainted with all the charges, whether consisting of rents or otherwise, which in any wise affected the house; and that his not being made acquainted with the rent of 210*l.* was occasioned by some undesigned omission or mistake.

In opposition to these affidavits, the solicitor of the plaintiffs swore, that he had been in receipt of the rent of 56*l.* a year nearly thirty years, which had been paid by Smith and Company since 1797, and that he had never heard that the house was ever granted by any under-lease, or was made subject to any other rent than the rent of 56*l.* until long after the sale to the bankers. And that upon inquiry he found, *that the rent of 210*l.* had been paid by the bankers themselves ever since they purchased the lease.*

The motion came on before Lord Eldon, who expressed an opinion in favor of the purchaser's right to rescind the contract, but did not decide the point. It afterwards came before Lord Erskine, who held this to be a proper case for the interference of equity, on the ground of *mistake* and accordingly granted the motion. The circumstance of both rents being payable by the purchasers, his lordship thought immaterial, as it appeared that they had not communicated that circumstance to their broker, and the magnitude of their concerns might easily account for the omission. It could not be imagined that any man would willingly conceal such a fact from a broker employed by him to value any property he wished to purchase; and it was equally absurd to suppose, that if a broker, in valuing any property, was ignorant of the existence of an additional rent of 200*l.*, no relief lay against such a mistake in a court of equity.

No. IX.

Ex parte Tomkins, L. I. Hall, 23d August, 1816.

A MORTGAGEE obtained an order for sale of the estates under a bankruptcy. The assignees, without leave of the court, appointed several puffers to bid, and two lots were knocked down to them. Lord Eldon determined that they must be held to their bargain, although they swore

that they believed there was no real bidder. And in answer to an application, that if there should prove to be a real bidder, the assignees might only be compelled to pay the price which he bid, the lord chancellor said, that although it was a hard case, they must pay the sum at which the lots were knocked down. The order was for a *sale*, and they were not authorized to buy the estate in ; their biddings might have prevented the estate from selling to a *bonâ fide* bidder, and it was impossible for the court to say that the estate would not have fetched more than the last real bidding, if the puffer appointed by the assignees had not afterwards bid. A majority of the creditors in such a case could not bind the rest, and if assignees choose to act, they ought to procure an indemnity from the creditors.

* The Appendix to the eleventh and several preceding editions contained the following cases, &c., to which it is considered now necessary only to refer :

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|---|---|
| Nos. 1, 2, 3. Conditions of Sale formerly in use and Agreements for Sale. | No. 17. <i>Bret v. Sawbridge</i> (Limitations of a term, with a note). |
| No. 8. Bill for extending provisions of Stat. of Frauds. | No. 18. <i>Forshall v. Cole</i> (Purchaser. Notice). |
| No. 10. Reasons for Appellant, in <i>King v. Hamlet</i> . | No. 19. <i>Burton v. Todd</i> (Purchaser. Rent and Interest). |
| No. 11. Observations on the Annuity Act. | No. 21. <i>Rea v. Williams</i> (Joint Purchase). |
| No. 12. <i>Coussmaker v. Sewell</i> (Lost Deeds. Title). | No. 22. <i>Lechmere v. Lechmere</i> (Satisfaction of Covenant). |
| No. 13. <i>Clay v. Sharpe</i> (Mortgage. Power to sell). | No. 23. Special verdict in <i>Fairfield v. Birch</i> (Remainders to Collaterals). |
| No. 14. <i>Belch v. Harvey</i> (Time. Disabilities). | No. 24. <i>Sloane v. Cadogan</i> (Voluntary Settlement). |
| No. 15. <i>The King v. Smith</i> (Purchaser. Crown Debts). | No. 25. <i>Bury v. Bury</i> (Notice to a Purchaser). |
| No. 16. <i>Att. Gen. v. Lockley</i> (Trust Estate. Dower). | No. 26. Of presuming a surrender of Terms (All the Cases considered). |

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